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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COPY

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
and ALLIANCE OF ARTISTS AND RECORDING COMPANIES,

Plaintiffs-Appellants,

v.

DIAMOND MULTIMEDIA SYSTEMS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
in CV 98-8247 ABC (RZx), Judge Audrey B. Collins

**BRIEF FOR APPELLEE
SUBMITTED BY DEFENDANT-APPELLEE
DIAMOND MULTIMEDIA SYSTEMS, INC.**

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Dated: December 22, 1998

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, defendant-appellee Diamond Multimedia Systems, Inc. states that it is a corporation organized under the laws of the state of Delaware. Diamond Multimedia Systems, Inc. has no parent corporations nor any publicly held companies owning 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Appellee is satisfied with Appellants' jurisdictional statement.

STATEMENT OF ISSUES

1. Whether the district court acted within its discretion in denying Plaintiffs' motion for preliminary injunction.
2. Whether the district court acted within its discretion in finding that Plaintiffs had not demonstrated any irreparable harm and the balance of harms required denial of a preliminary injunction.
3. Whether the district court acted within its discretion in finding the Rio PMP 300 Portable Music Player does not violate the Audio Home Recording Act.
4. Whether the district court's decision should be affirmed on the ground that the Rio player is not a "digital audio recording device" as defined by the Audio Home Recording Act.
5. Whether the district court's decision should be affirmed because the Audio Home Recording Act cannot be constitutionally applied to ban manufacture, import, or distribution of the Rio player.

STATEMENT OF THE CASE

A. Diamond Multimedia and the Rio PMP 300 Portable Music Player.

Diamond Multimedia manufactures and sells computer peripheral products used for multimedia and connectivity applications. Supplemental Excerpts of Record ("SER") at 51 (Supplemental Declaration of Kenneth Wirt ("Wirt Supp") ¶ 2-3). Examples of its products include modems and circuit boards that accelerate video graphics. Id.

This case concerns Diamond Multimedia's introduction of a small computer peripheral device, the Rio PMP 300 Portable Music Player. The Rio player is the first widely available computer peripheral product that plays MP3¹ formatted audio files. Excerpts of Record ("ER") 15 (Wirt ¶ 6). The MP3 format is especially popular for the delivery and enjoyment of music by computer because it compresses digital audio by approximately a 10:1 ratio. This means that music can be stored

¹ Through joint cooperation of various international entities, Moving Picture Experts Group ("MPEG") Audio Layer 3 (called "MP3" for short) was developed as a standardized, very powerful algorithm for data compression. SER 4 (Declaration of Andrew Bridges ("Bridges") Exh. A), 46 (Declaration of Don Spencer "Spencer") ¶ 2).

with less memory and be transferred more quickly, while retaining nearly the original quality of the sound during playback. SER 46 (Spencer ¶ 2); SER 2, 4-11 (Bridges ¶ 2, and Exh A).

The Rio player is a small, handheld device that plays music and other audio through attached headphones that are provided with the player. ER 13-14 (Wirt ¶ 2). The Rio player also comes with separate computer software, called Rio Manager, which is stored on the computer hard drive and is used by the computer to store the MP3 audio files on the Rio player. ER 13-14 (Wirt ¶ 2); SER 75 (Spencer ¶ 5). A parallel port cable, provided with the Rio, is used to plug the Rio player into the personal computer. ER 13-14 (Wirt ¶ 2).

The Rio player is entirely dependent on a personal computer in order to receive files containing music. SER 75 (Spencer ¶¶ 5-6). The computer stores MP3 audio files on its hard drive. Id. The computer obtains MP3 files from the Internet, and it can also convert audio from other sources, such as a compact disk ("CD") in the computer's CD-ROM drive, into an MP3 file. Id.

To activate a Rio player, a user must connect the Rio to a personal computer and, using proprietary Rio Manager software located on the computer, store onto

the Rio player MP3 audio files from the computer's hard drive. Id. The Rio can store approximately one hour of music or eight hours of spoken word. SER 76 (Spencer ¶ 7). Flash memory cards for an additional half-hour or hour of music are available to expand the base memory and playback capacity. SER 76 (Spencer ¶¶ 7-8).

An advantage of the Rio player as a computer peripheral is its portability. Small and light, about the size and weight of a pager, the Rio can be detached from the computer for playback but not for recording. SER 51-52, 54-59 (Wirt Supp ¶¶ 5-6, Exhibit A). It replays audio files only by sending an analog audio signal to headphones. SER 76 (Spencer ¶ 10). The Rio is smaller, lighter, more versatile, and less expensive than other high-quality portable music devices.

Apart from the headphones, the Rio has no output. SER 76 (Spencer ¶ 11). Neither the Rio player nor the associated Rio Manager software that resides on the personal computer can store the MP3 audio files onto a computer's hard drive. SER 75-76 (Spencer ¶¶ 5-6, 12). Nor can the Rio transfer or create duplicates of any audio files it stores. Id.

At the time of the preliminary injunction, the Rio did not contain a serial copy management system. Since the preliminary injunction, Diamond Multimedia has incorporated such a system, through alteration of the associated Rio Manager software that runs on a personal computer. The system makes no practical difference.

B. The Audio Home Recording Act of 1992.

I. The Legislative Compromise.

Enacted to resolve a controversy between the recording industry and electronics manufacturers over the advent of digital audio tape, the Audio Home Recording Act of 1992, 17 U.S.C. § 1001 et seq. (the "Act" or the "AHRA"), is the embodiment of a "historic compromise [which] was reached by all of the parties to the audio home taping dispute." S. Rep. 102-294 at 33 (1992). The stated purpose of the legislation "is to insure the right of consumers to make analog or digital audio recordings of copyrighted music for their private use." S. Rep. 102-294 at 51.

The legislation arose from the emergence of a new technology. In the mid-eighties, consumer-electronics manufacturers were preparing to market digital audio tape recorders to American consumers. H.R. Rep. 102-780(I) at 18 (1992).

Plaintiff Recording Industry Association of America ("RIAA") threatened lawsuits for contributory copyright infringement against manufacturers that decided to do so. Id. This adversarial climate had a chilling effect on the consumer-electronics manufacturers and introduction of the technology was halted. Id.

RIAA acted out of a particular concern about digital copying of recorded music. The new digital technology could allow an endless series of exact copies, made from earlier copies, without loss of sound quality. With analog devices such as ordinary cassette tape recorders, every successive generation of copies suffers degradation of the sound, limiting the practical utility of multigenerational copying. Digital copying did not suffer that constraint. H.R. Rep. 102-780(I) at 18.

The compromise in the AHRA included an express immunity from copyright infringement liability for consumers to use devices covered by the Act to make copies of audio recordings for personal use. There is no limit to the number of copies for which the immunity applies. See 17 U.S.C. § 1008. The Act also afforded immunity to manufacturers of devices covered by the Act. Id. In return for the recognition of immunity for home recording of copyrighted works, and for manufacturers of devices covered by the Act, the Act has two components favoring

the recording industry. It directs that recording devices governed by the Act contain a system, called the "Serial Copy Management System" ("SCMS"), to limit the number of consecutive copies that a series of the recording devices can make. See 17 U.S.C. § 1002 et. seq. The Act also establishes a royalty system for the recording devices and for their recording media. See 17 U.S.C. §§ 1003-7.

2. The "Serial Copy Management System" and Deletion of Its Reference Document from The Legislation.

Congress has described the origin of the "Serial Copy Management System." "In June 1989, the recording industry and the consumer-electronics industry signed a Memorandum of Understanding in Athens, Greece. The parties agreed to make joint recommendations to governmental entities that the Serial Copy Management System ("SCMS") be required to regulate the serial copying of digital audio recordings." H.R. Rep. 102-780(I) at 18. Following this agreement, legislation was introduced in the 101st Congress to require the implementation of the SCMS in digital audio tape recorders. Id. at 19. This legislation eventually became the Audio Home Recording Act. See generally, Paul Goldstein, Copyright's Highway, 158-163 (1994).

Congress originally considered defining SCMS by a "Technical Reference Document":

The definition of "Serial Copy Management System" in the bill as introduced referred to the system for regulating serial copying by digital audio recording devices as set forth in the "Technical Reference Document" SCMS will allow copying but only in a limited circumstance. The system places limitations on 'serial' copying The SCMS limits copying to one copy, or no copies, or permits unlimited copies.

H.R. Rep. 102-873(I) at 14. Originally the SCMS Technical Reference Document² was part of the draft legislation, but it was deleted because Congress determined that "any incorporation of the entire Technical Reference Document directly into legislation or indirectly through an agency regulation is inconsistent with Congress's responsibility to make the policy decisions implied by the document."

H.R. Rep. 102-873(I) at 14. Although the AHRA requires that devices governed by the Act conform to either the SCMS or a functional equivalent, as a result of the deletion of the Technical Reference Document the Act does not authoritatively identify a specific system or standards which must be employed.

²A copy of the Technical Reference Document from the House Report is included in the addendum to this brief for ease of reference.

3. Authorized Serial Copying.

The AHRA does not prohibit all serial copying. It requires that serial copying be limited by either (1) the "Serial Copy Management System" ("SCMS"), (2) a functionally equivalent system that respects SCMS coding, or (3) any system certified by the Secretary of Commerce that "prohibit[s] *unauthorized* serial copying." 17 U.S.C. § 1002(a) (emphasis added). SCMS in certain circumstances "permits unlimited copies." S. Rep. 102-294 at 36. A type of serial copying that is authorized under the statute is serial copying of sound recordings that lack information regarding copyright status. 17 U.S.C. §§ 1001(3)(A), 1002(d)(2).

It is undisputed that personal computers are not governed by the AHRA and do not act on SCMS codes that carry information regarding copyright status. The parties also agree that MP3 formatted files do not carry SCMS codes. Plaintiffs do not quarrel with the district court's factual finding that "MP3 files on the computer's hard drive do not contain this [copyright and generation status] information." ER 128:11-15 (Order Re: Plaintiff's Motion for Preliminary Injunction ("Order re PI")).

4. AHRA Distinguished from Copyright Infringement Statutes.

The AHRA occupies a distinct chapter of the Copyright Act that was added in 1992. The AHRA does not regulate copyright infringement. Indeed, the AHRA provides certain immunities from copyright infringement liability. 17 U.S.C. § 1008. Plaintiffs do not allege copyright infringement. Plaintiffs' case consists solely of one cause of action alleging violation of the AHRA.

C. MP3 and the Emerging Internet Music Market.

The Internet has opened significant new opportunities for the distribution of recorded music, as it has for computer software and other types of commerce. SER 25 (Declaration of Robert H. Kohn ("Kohn") ¶ 17). With traditional means of record distribution controlled by a few dominant companies,³ independent recording companies and artists struggle for retail shelf space and radio air time. SER 24-25 (Kohn ¶¶ 12, 15-16). Independent artists outside the mainstream find record companies' control over music distribution to be a significant career-limiting

³ RIAA is a trade organization representing the commercial interest of record companies, principally the half-dozen companies that control ninety percent of the distribution of recorded music in the United States. SER 25 (Kohn ¶ 13).

roadblock. SER 20 (Declaration of Gian Caterine ("Caterine")) ¶¶ 4-6). The Internet allows widespread distribution of recorded music by artists directly and by Internet recording companies, bypassing record stores and commercial radio. SER 25 (Kohn ¶ 17). For discussions of the advent of Internet music distribution, see generally Nikki Goth Itoi, Hard Day's Night, Red Herring, Jan. 1999, at 60; Jon Pareles, With A Click, An New Era of Music Dawns, N.Y. Times, Nov. 15, 1998, at sec.2 p.1 (nat'l. ed.).

MP3 music distribution has been embraced by musicians and Internet record companies as the first practical means of competing with the dominant companies. SER 20-21(Caterine ¶ 6), SER 22 (Kohn ¶ 1), SER 31-32 (Declaration of Dennis Mudd ("Mudd") ¶ 7). CD manufacturing and physical distribution costs, and limited access to shelf space in record stores, are substantial barriers to entry for new record labels and artists. Internet music distribution reduces those barriers. SER 25 (Kohn ¶ 17).

MP3 is emerging as the format preferred by Internet record companies, such as GoodNoise, MusicMatch, and MP3.com. GoodNoise, founded in January 1998, was the first record company to focus on the Internet as a platform for sale and

electronic delivery of music. SER 22 (Kohn ¶ 1). GoodNoise has licenses to distribute thousands of musical recordings to customers via the Internet. SER 22 (Kohn ¶ 2) MP3.com takes another approach to Internet music distribution. MP3.com allows artists to market and sell their compositions via the Internet using MP3. Artists can transfer songs from their own computers to MP3.com's computer which visitors to www.mp3.com can download to their own computers. SER 36 (Declaration of Michael Robertson ("Robertson") ¶¶ 2-3). Over 4 million songs were legally copied from MP3.com in less than one year since the service began. Id.

At its Web site, MusicMatch offers one of the largest collections of MP3 music files, all legal. SER 31 (Mudd ¶ 6). For MusicMatch, MP3 provides an excellent way to market artists who would otherwise languish outside the notice of big recording companies. MusicMatch customers can listen to free MP3 formatted songs, which introduce customers to new, little known artists, whose CDs then can be purchased through the Web site. SER 31-32 (Mudd ¶ 7). Songs.com similarly uses MP3 format as a promotional vehicle to provide exposure to music that customers can buy on CD over the Internet. SER 42 (Declaration of Paul Schatzkin

("Schatzkin") ¶ 15). Even popular groups with major recording contracts have chosen to use MP3 Internet distribution for promotional releases to stimulate interest in their CD recordings. See SER 2, 16-18 (Bridges ¶ 5, Exh.D). See also Alex Gove, Beastie Bandwidth, Red Herring, Jan. 1999, at 56 (interview with popular band "Beastie Boys" regarding Web music delivery).

The intense interest in MP3 by the recording industry is generated by the fact that MP3 is an open standard that opens up new channels of distribution not influenced by the major labels. SER 33 (Mudd ¶ 11). The major labels, who control Plaintiffs in this case, fear their loss of control over distribution. SER 24-25 (Kohn ¶¶ 10-12).

Plaintiffs improperly equate MP3 technology with Internet "piracy." Undoubtedly copyright infringers have posted illegal music copies on the Internet in the MP3 format. Plaintiffs have presented only speculation, not any actual proof, however, that so-called "pirate" Internet distribution of music has reduced the market for legitimately recorded music. A neutral study commissioned by Congress in 1987 to study the effects of home recording on record sales "acknowledged that the factual assessment of home taping's effect on sales of pre-recorded music was

far from clear." Goldstein, Copyright's Highway 160. Software publishers and retailers now regularly distribute far more expensive products by the Internet and have found it preferable to traditional distribution. See S. Rupley, Shop Till You Download, PC Magazine, Apr. 22, 1997, at 28.

RIAA's own Web site praises its efforts at combating copyright infringement of recorded music and notes how minimal the problem is in comparison with recorded music sales. SER 2, 12-13 (Bridges ¶ 3 and Exh. B); see also SER 33 (Mudd ¶ 12). News reports reflect the fact that alleged "pirate" MP3 sites are hard to find. One reporter describes spending several fruitless hours trying to locate illegal MP3 files on the Internet only to find that most of the illicit sites she identified had already been taken down. Janelle Brown, Is Rio Grand?, Salon Magazine (Dec. 8, 1998) <www.salonmagazine.com/21st/reviews/1998/12/09review.html> ("After several hours of fruitless searching for a good illegal MP3 song, I simply gave up."). On the other hand, as discussed above, Diamond Multimedia has furnished proof of substantial legitimate distribution of music in MP3 format over the Internet.

The specter of "Internet piracy" allegedly facilitated by MP3 is nothing more than an emotionally charged side show in this case. Plaintiffs made no claim of "Internet piracy" or contributory copyright infringement against Diamond Multimedia. See Clerk's Record ("CR") 1 (Complaint). Neither the Rio player nor its Rio Manager software can connect with the Internet. SER 75-76 (Spencer ¶¶ 10-12). Neither can facilitate downloading of music from the Internet onto the computer (where it must reside before it can be stored on a Rio player). Neither can upload music to the Internet. Id. The Rio player is not even capable of converting digital files into the MP3 format. SER 75 (Spencer ¶ 5-6).

Plaintiffs' concern -- that the Rio will make MP3 files more popular -- rests upon the false assumption that MP3 is inherently evil. Plaintiffs ignore substantial legitimate uses of MP3 compression, and the legitimate MP3 music market, which the Rio is designed to promote.

D. Proceedings In The District Court.

Plaintiffs Recording Industry Association of America, Inc. (RIAA) and Alliance of Artists and Recording Companies (AARC) filed their complaint initiating this action and their Application for Temporary Restraining Order (TRO)

and accompanying papers on October 8, 1998. Defendant Diamond Multimedia Systems, Inc. received copies of these documents on Friday, October 9. The district court ordered Defendant to file its written opposition to the Application for TRO by Tuesday, October 13. The district court held the hearing on the TRO on Friday, October 16.

The district court heard lengthy oral argument at the October 16 hearing. Before argument, the district court had distributed a memorandum to the parties outlining the court's preliminary thoughts and questions it wished to be addressed at the hearing. ER 6-12 (Memorandum to The Parties From Judge Collins). Indicating that it had much to consider in the upcoming ten days, the court nevertheless entered a TRO halting Defendant's manufacture, import and distribution of its Rio player. CR 48 (Temporary Restraining Order). The court's order did not incorporate any of its preliminary thoughts set out in its memorandum to the parties, and the memorandum to the parties was never made part of the court's record below.⁴

⁴ Plaintiffs' inclusion of this memorandum in its Excerpts of Record is unauthorized by Circuit Rule 10-2 (defining "complete record" for purposes of appeal).

The court set a hearing on the preliminary injunction for ten days after the TRO hearing, Monday, October 26. The court ordered Defendant to file an opposition on Tuesday, October 20; Plaintiffs' reply papers were due October 24. Because of the short time schedule for preparing opposition papers to both the TRO and preliminary injunction and preparing for both hearings, Defendant had not filed its answer and counterclaim (originally due November 2) before the preliminary injunction hearing.

The court took oral argument on the order to show cause on a preliminary injunction on Monday, October 26, just seventeen days after Defendant first received the complaint and TRO papers. The court denied the request for a preliminary injunction at the hearing, which it confirmed in a written order filed on October 26 and entered October 28.

The court found that Plaintiffs had not demonstrated a probability of success on the merits, describing Plaintiffs' showing as merely "mixed." ER 129:8-130:1 (Order re PI). The court found that the Rio player does not engage in unauthorized serial copying prohibited by the AHRA. ER 129:3-5 (Order re PI). The court held that incorporating the Serial Copy Management System ("SCMS") into the Rio

player, which Plaintiffs maintained the Rio was required to do by the AHRA, would be useless:

Incorporating SCMS into the Rio . . . accomplishes nothing. The Rio could not "act[] upon copyright and generation status information" because the MP3 files on the computer's hard drive do not contain this information. Similarly, it is undisputed that the Rio does not permit downstream copying because the Rio device itself has no digital output capability, and the removable flash memory cards cannot be copied by another Rio device. Therefore, it is nonsensical to suggest that the Rio must "sen[d] . . . copyright and generation status information." In summary, incorporating SCMS into the Rio appears an exercise in futility.

ER 128:10-19:1 (Order re PI) (footnotes omitted).

The court also held Plaintiffs did not establish that they would suffer irreparable harm if Defendant were not preliminarily enjoined. The court found as a factual matter that, "[i]ncorporating SCMS into the Rio would not prevent the Rio from downloading an MP3 file from a computer's hard drive." Id. n. 6. It also found as a factual matter that an absence of SCMS in the Rio would not cause the illegitimate uses and that even the inclusion of SCMS would not affect illegal traffic in MP3 files. ER 130 (Order re PI). The court concluded that Plaintiffs "failed to establish any irreparable or incalculable injury." ER 131 (Order re PI).

In contrast, the court found that both Diamond Multimedia and the public stood to suffer if the Rio player was not made available. The court specifically made the factual finding that "because the Rio is capable of recording legitimate digital music, an injunction would deprive the public of a device with significant beneficial uses." Id.

Plaintiffs filed a notice of appeal of the preliminary injunction ruling on October 27, 1998.

SUMMARY OF ARGUMENT

The district court acted rightly and within its discretion in denying Plaintiffs' motion for preliminary injunction. The district court rightly found as a factual matter that a Rio without SCMS is the functional equivalent of a Rio with SCMS, that presence or absence of SCMS in the Rio makes no practical difference, and that, as a result, there can be no realistic harm or substantive violation of the AHRA resulting from the absence of SCMS in the Rio.

This court should also affirm the district court's decision on the ground that the Rio is not a "digital audio recording device" within the meaning of the AHRA. This conclusion flows from the district court's factual finding that the Rio receives audio files solely from the hard drive of a personal computer. To be a "digital audio recording device," under the AHRA, the Rio must copy from a material object that meets the definition of a "digital musical recording." Under the AHRA, the hard drive is not a "digital musical recording." Therefore, the Rio is not a "digital audio recording device" because it receives its files only from a computer hard drive.

This court should also affirm on the further ground that the AHRA cannot be constitutionally applied to ban distribution of the Rio. The Constitution prohibits

the enforcement of a vague statute, with an undefined standard, to ban a new technology for substantial lawful dissemination and enjoyment of expression. The Constitution also does not allow Congress to enact a statute under the Copyright Clause that not merely fails to support, but undermines, the constitutional purposes of copyright law.

ARGUMENT

I. Standard of Review

A. The Standard of Review of Both Law and Facts on a Motion for Preliminary Injunction is Abuse of Discretion.

A district court's order regarding preliminary injunctive relief is reviewed for abuse of discretion. Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998), cert. granted, 119 S.Ct. 31 (1998). This court will review "only the district court's consideration of the likelihood of success on the merits at one end of the scale, and the possibility of irreparable harm at the other end of the scale." Id. Issues of law underlying the district court's decision on the preliminary injunction are not reviewed under a separate standard. See id. n.1.

B. The Court of Appeals May Affirm on Any Ground That Has Support in the Record.

The court of appeals may affirm on any ground that has support in the record. Gemtel Corp. v. Community Redevelopment Agency of Los Angeles, 23 F.3d 1542, 1546 (9th Cir. 1994); Kruso v. Int'l Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 496 U.S. 937, 110 S.Ct. 3217 (1990). So long as the decision below is correct on any theory, the court of appeals may affirm even if the

lower court relied on wrong grounds or faulty reasoning. Aronson v. Resolution Trust Corp., 38 F.3d 1110, 1114 (9th Cir. 1994) (emphasizing that the court is not limited either by defenses offered by the appellee or by the grounds relied upon by the district court); Marino v. Vasquez, 812 F.2d 499, 508 (9th Cir. 1987). "The appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." Rodriguez v. Herman, 121 F.3d 1352, 1355 n. 2 (9th Cir. 1997) (quoting Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 481, 96 S.Ct. 2158, 2159, (1976)).

In addition to the district court's correct determination that Plaintiffs have not demonstrated a violation of the AHRA or sufficient harm, and that the balance of equities tips against an injunction, the district court's denial of a preliminary injunction should be upheld on the grounds that AHRA does not apply to the Rio player and cannot be constitutionally applied to ban the Rio.

II. The District Court Acted Rightly and Within Its Discretion In Denying A Preliminary Injunction.

A. The District Court Correctly Found Plaintiffs Lacked a Probability of Success on the Merits.

The district court denied the preliminary injunction having determined that Plaintiffs had not established a probability of success on the merits. ER 129-130 (Order re PI). If Plaintiffs ultimately were able to establish that the Rio is a "digital audio recording device," the district court predicted that they would fail to establish any injury resulting from a violation of the AHRA. ER 130-131 (Order re PI). Without injury resulting from a violation of the AHRA, there is no cause of action. 17 U.S.C. § 1009 (a) and (b). Thus, although the district court found that Plaintiffs had only a "mixed" probability of success with respect to different elements of the cause of action, the failure of any one element will cause the entire action to fail.

1. The Rio Player Is Not a "Digital Audio Recording Device" Subject to the AHRA.

Congress passed the Audio Home Recording Act to ensure the right of consumers to make analog or digital copies of sound recordings for personal use.

See S. Rep. 102-294 at 51. The AHRA expressly immunizes that activity in 17 U.S.C. § 1008.

Congress also sought to combat a very specific problem implicated by the advent of digital technology: serial copying, or the ability to make unlimited generations of perfect copies from a single musical recording. Congress solved the problem of serial copying by designating a category of devices capable of serial recording and imposing upon manufacturers of those devices a requirement that they include a "Serial Copy Management System." See 17 U.S.C. §§1001-1002. The Act was not intended to inhibit the listening of digital music, or even the making of multiple copies of a recording - only multiple *generations* of serial copying of digital music, in other words making copies of copies.⁵

The AHRA mandates that "[n]o person shall import, manufacture, or distribute any *digital audio recording device*" unless the device incorporates certain specified copying controls. 17 U.S.C. § 1002(a) (emphasis added). Plaintiffs base

⁵ The Act does not prohibit technology that can make thousands of copies, even for distribution, so long as those copies are the same "generation." Thus, for example, it does not cover technology that can be used by a person to make 20 copies of a CD to give to friends, so long as they are all recorded from the same original. See H.R. Rep. 102-873(I) at 19.

their lawsuit on the single claim that the Rio player is a "digital audio recording device" within the meaning of the AHRA and that the device violates Section 1002(a) because it lacks the Serial Copy Management System. The plain language of the statute discloses, however, that the Rio is not a device covered by the AHRA. The result flows from a series of related definitions.

The Act defines a "digital audio recording device" in pertinent part as

any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a "digital audio copied recording" for private use . . .

17 U.S.C. § 1001(3). In turn, the Act defines a "digital audio copied recording" as "a reproduction in a digital recording format of a *digital musical recording*, whether that reproduction is made directly from another *digital musical recording* or indirectly from a *transmission*." 17 U.S.C. § 1001(1) (emphasis added).

Thus, a device cannot be considered a digital audio recording device within the meaning of the Act unless it is capable of either: (1) digital reproduction directly from a digital musical recording, or (2) the digital reproduction of a digital musical

recording from a transmission. In either case, the focus of the Act is on reproduction from "digital musical recordings."

a. **The Rio Player Is Not Capable of Making a Recording From a "Digital Musical Recording" Within the Meaning of the AHRA.**

The definition of "digital musical recording" is the key to the question of applicability of the AHRA to the Rio player. If the hard drive from which the Rio gets its digital audio files does not qualify as a "digital music recording," the Rio is not a "digital audio recording device" under the Act.

A great deal of thought and controversy underlay the definition of "digital musical recordings" and especially its exclusions. See S. Rep. 102-294 at 35-36, 45-47; see also SER 67-70 (Declaration of James M. Burger ("Burger")) ¶¶ 15-16, 18-20). The concept of "digital musical recording" had its roots in the concept of "phonorecords," which was well established in copyright law. A phonorecord is a physical medium, a "material object" on which certain sounds are fixed. See 17 U.S.C. §101 (definitions). In the AHRA, Congress embraced the concept but did not want all of the legal associations that had grown around "phonorecords" in the Copyright Act. For the AHRA, therefore, Congress used the term "audiogram,"

which became the term "digital musical recording" at the time of enactment. See S. Rep. 102-294 at 35 (stating that the term 'phonorecord' was used in S1623 because the term is used elsewhere in the Copyright Act; and adding that the bill's sponsor expressed concerns that "the bill as introduced may inadvertently encompass some form of technology that was not intended. After consultation with the computer and telecommunications industries it became apparent that the term 'phonorecord' and its attendant definitions might be overly broad"); see also SER 62, 64 (Burger ¶¶ 6, 9) ("[T]he legislation's original language was extremely broad and could have been interpreted to subject computers and computer peripherals to various technical requirements"); cf. Melville B. Nimmer and David Nimmer, Nimmer on Copyright §8B.02[A][1] n. 17 (1997) (opining that the term "audiogram" is a "more evocative term than the ponderous one [digital musical recording] ultimately adopted").

i. **"Digital Musical Recordings" Are Material Objects.**

"Digital musical recording" is defined by the statute as a type of *material object*. The term "material object" is used elsewhere in the Copyright Act in definitions of "audiovisual works," "copies," "literary works," "phonorecords," and

"sound recordings." "Material object" can include a wide variety of products. See

17 U.S.C. § 101. The definition of "sound recordings" is particularly instructive:

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of *the material objects, such as disks, tapes, or other phonorecords*, in which they are embodied.

17 U.S.C. § 101 (unnumbered paragraph defining "sound recordings") (emphasis added). "Disks" encompasses hard drives. SER 77 (Spencer Supp. ¶ 14).

ii. **Computer Hard Drives Are Not "Digital Musical Recordings."**

The AHRA *excludes* from the definition of "digital musical recordings" certain types of material objects, namely those:

in which *one or more computer programs are fixed*, except that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material.

17 U.S.C. § 1001(5)(B)(ii) (emphasis added); see S. Rep. 102-294 at 46 ("[I]f the material object contains computer programs or databases that are not incidental to the fixed sounds, then the material object would not qualify as an "audiogram").

This exclusion of certain material objects such as hard disks from the governance of the AHRA was designed to exempt objects containing general purpose computer programs. This was done in direct response to concerns expressed by the computer industry that the sweep of the AHRA was too broad.

[C]ertain members of the computer industry have expressed concerns that the language of [the legislation] does not make sufficiently clear that material objects containing general purpose computer programs are not included within the definition of "audiogram." In order to further clarify this point, the definition of the term "audiogram" has been amended to expressly exclude material objects in which one or more computer programs are fixed, except for certain specialized statements or instructions that may be contained in CD's, digital audio tapes, and similar objects covered by the legislation.

138 Cong. Rec. S8409, S8422 (June 17, 1992) (statement by Sen. DeConcini, sponsor of the legislation) SER 64-70 (Burger ¶¶ 9, 11, 14-19) ("The negotiated language of Section 5(B)(ii) was the basis for the [Computer and Business Equipment Manufacturers Association's] withdrawal of our opposition to the legislation"). The definition of "audiogram" was later edited to add the sub-section embodying the exemption for computer storage media to which Senator DeConcini alluded. See H.R. Rep. 102-780(I) at 2 (reporting on August 4, 1992, the revised

definition of "audiogram"). Congress' intent in creating this exception was to exclude the personal computer products industry from the AHRA:

In crafting this legislation, the committee intends to address the longstanding issue of audio recording, and only audio recording. . . . The committee has been careful to make clear that this legislation is limited to this issue and to avoid affecting other technologies or other interests even by implication.

S. Rep. 102-294 at 52; SER 63-64 (Burger ¶¶ 7,8) ("The rapid advance of information technology is exactly the reason the computer industry opposes government regulation of technology. Accordingly, in 1992, we thought it ill advised to trap any technology affecting computers in statutory amber.").

Representative Collins, a principal sponsor of the Act, explained as the legislation was being passed in the House that "the legislation does not cover products primarily marketed by the computer industry" 138 Cong. Rec. H9029, H9036 (Sept. 22, 1992).

As shown above, the statutory language, by its express terms and as supported by legislative history, excludes the hard drive of a personal computer from the definition of "material objects" that are "digital musical recordings."

Plaintiffs contended below that this exclusion was designed for "computer programs" but not for computer hard drives. The Plaintiffs err by failing to distinguish between *material objects* and *works*. A computer program is a work; it is not a material object, although it can be embodied *in* a material object. See 17 U.S.C. §101 ("A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result"); see also Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1249 (3d. Cir. 1983) cf. SER 66-67 (Burger ¶ 14-15) ("The statute does not propose to directly exempt a computer program -- which is not a material object.").

Computer programs are considered "literary works" under the Copyright Act. Apple Computer, 714 F.2d at 1249. "'Literary works' are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, *regardless of the nature of the material objects*, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, *in which they are embodied*." 17 U.S.C. §101 (emphasis added). As a consequence, computer programs themselves cannot be considered the "material objects" that are excluded

from the definition of "digital musical recordings" under the AHRA. The exclusion applies, instead, to hard drives.

b. The Rio Player Is Incapable of Recording a Transmission From a Digital Musical Recording Within the Meaning of the Act.

As stated above, under the AHRA, a digital audio recording device must be capable of making a digital reproduction either from a digital musical recording, as when a copy is made from a CD or digital audio tape, or from a transmission from a digital musical recording, as when a digital audio tape deck records the transmission of a CD or digital tape through a digital radio signal. See 17 U.S.C. § 1001(1). Plaintiffs also attempt to bring the Rio under the AHRA on the ground that it receives a transmission from a digital musical recording. Their argument is rebutted by the AHRA's statutory language.

Any transmission from the hard drive of a remote computer server⁶ via the Internet to a personal computer would not be a transmission from a "digital musical recording" within the meaning of the Act. The server from which the Internet

⁶ A "server" is a computer that stores, on its hard disk, application programs and data files which can be accessed by remote computers connected to the server by a network. Webster's New World Dictionary of Computer Terms 196 (6th ed. 1997).

transmission occurs is not a "digital musical recording" because it would contain general purpose programs. 17 U.S.C. § 1001(5)(B)(ii).

Even if the downloading of MP3 files over the Internet from a remote server to a computer's hard drive were to fall under the AHRA's definition of a "transmission" of a digital musical recording, the Rio player, however, is not involved in receiving any transmissions from the Internet. The Rio does nothing more than store the MP3 files that were transmitted to the computer's hard drive. SER 75 (Spencer ¶ 5).

Moreover, the downloading of an MP3 file from a user's local hard drive into the Rio is not a transmission for the purposes of the Act. Although the AHRA does not contain a definition of "transmission," the term "transmit" is defined in Section 101 of the Copyright Act. 17 U.S.C. § 101. "To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." Id. "The 'place' or 'places' are perforce 'beyond the place from which' the performances originate." Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc., 866 F.2d 278, 282 n. 6 (9th Cir. 1989).

Under the definition of "transmit" supplied by the Copyright Act, the downloading of an MP3 file from a computer to a peripheral device which, like the Rio player, is connected to that same computer, is not a transmission. The Rio player is connected to the computer by a short cable and does not receive files at a different location. SER 53 (Wirt ¶ 11). The Rio player is just like a printer, a keyboard, or other peripheral device that is connected locally to the computer. SER 51-52 (Wirt ¶ 5). Communicating at the same location is not a transmission within the meaning of the copyright laws. Because the Rio does not receive audio from a digital musical recording either directly from a digital musical recording or indirectly from a transmission, it is not a digital audio recording device and is not subject to the AHRA.

2. If The Rio Player Is Subject to the AHRA, It Satisfies The Act.

Section 1002(a) states the SCMS-related requirements of digital audio recording devices that are subject to AHRA. There are three means of satisfying the requirements.

a. **The "Serial Copy Management System" Under Section 1002(a)(1).**

Section 1002(a)(1) provides for conformance with the "Serial Copy Management System." That system is wholly undefined by statute or regulation. Congress originally included in the legislation a definition of SCMS and provisions for enacting the "Technical Reference Document," a detailed description of the SCMS functional and technical characteristics. H.R. Rep. 102-873(I) at 13. "These definitions were deleted in light of the alternative forms for preventing serial copying . . . and the Committee's policy decision *to avoid any inappropriate delegation of Congressional responsibility to private parties.*" *Id.* at 13-14 (emphasis added). The private parties appear to be those who, in connection with the Athens Agreement, crafted the proposed Technical Reference Document that was deleted from the Act.

The draft legislation also had authorized the Secretary of Commerce to issue orders approving changes to the SCMS and setting standards for new devices as new technological capabilities developed. H.R. Rep. 102-780(I) at 20-21.

Congress reserved for itself this type of policy-making by deleting several sections of the legislation before enactment. H.R. Rep. 102-873(I) at 14.

No evidence of the substance of the system was actually presented to the district court. The most Plaintiffs could offer was a declaration of a faculty member of University of Miami School of Music, who stated: "SCMS is defined *more particularly by certain* technical standards and specifications that draw *in part* on an international digital audio interface standard known as IEC 958." ER 79 (Supplemental Declaration of Kenneth C. Pohlmann) (emphasis added). Plaintiffs never furnished to the district court the content of any of those standards and specifications. "IEC" refers to "International Electrotechnical Commission," a Swiss-based standard-setting membership organization composed of private committees.

Plaintiffs themselves stress that "the AHRA is not a codification of common law or a restatement of preexisting obligations. It is a new, comprehensive statutory scheme enacted to balance conflicting interests." Appellants' Brief 28. Defendant agrees. The AHRA, not being a codification of common law, cannot depend upon the private, unenacted Athens Agreement or a collection of

unidentified private standards as common-law-like sources of law. Being a "comprehensive statutory scheme," it cannot properly impose a requirement that lacks content because Congress deleted it. For this reason, Section 1002(a)(1) cannot apply to *any* device.

b. The Functional Equivalent of SCMS Under Section 1002(a)(2).

More directly applicable in the absence of an explicit SCMS definition, The AHRA provides that a digital audio recording device may conform to--

a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system's method of serial copying regulation and devices using the Serial Copy Management System.

17 U.S.C. § 1002(a)(2). As the district court noted, "a Rio without SCMS is functionally equivalent to a Rio with SCMS." ER 129:2-3 (Order re PI). For that reason, the Rio satisfies this statutory provision.⁷

⁷ Since the district court's decision, Diamond Multimedia has incorporated a serial copy management system in the Rio Manager software that resides on the personal computer. It did so in an abundance of caution to avoid any suggestion of violation of the AHRA without conceding its application. It is significant that the implementation of SCMS in the Rio peripheral device must be carried out in the personal computer itself. (footnote continues next page)

Based upon the description of the proposed Serial Copy Management System in the legislative history -- to the extent it is appropriate to look at the legislative history of a provision specifically withdrawn from the legislation -- the intended but unexpressed functional characteristics can be stated simply.

An SCMS-compliant device will accept a file with codes indicating "copyright claimed - original generation." Upon receipt it changes the codes in the file to "copyright claimed - first generation." This change prevents other SCMS-compliant devices from making further copies of the file. Accepting only files with certain codes, and preventing copying by other SCMS-compliant devices of files with certain codes, are the characteristics which satisfy Section 1002(a)(2). H. R. Rep. 102-780(I) at 42-43 ("General Principles for SCMS Implementation in DAR Devices").

The Rio meets these characteristics. It cannot receive files from an SCMS-compliant device, so it will never improperly accept a "copyright claimed - first

The software has no effect on the files stored on the computer's hard drive; it affects only the files stored in the Rio. Because the Rio cannot create duplicates of its files, and because the law does not require MP3 files to be encoded with SCMS codes, the implementation of SCMS has made no practical difference, as the district court understood.

generation" file. It prevents other devices from receiving "copyright claimed - first generation" files because it sends no files to any device whatsoever.

Section 1002(a)(2) also requires accurate sending of, receipt of, and action upon SCMS codes passed *between a device and other devices using SCMS*. The Rio receives its files only from a personal computer -- which is unambiguously excluded from the AHRA -- and does not deliver any digital output at all. Because the Rio does not receive or pass files from or to another device using SCMS, there is no requirement to carry out SCMS coding activities. As a consequence the Rio does everything Section 1002(a)(2) requires of it.⁸ Indeed, the Rio goes beyond the restrictions on copying that SCMS imposes. The district court recognized that the Rio receives no files with SCMS codes that prohibit copies, and the Rio allows no downstream copying at all, even of files coded "original" as to which the Technical Reference Document authorizes further copying. ER 128:11-18 (Order re PI).

⁸ Although the district court couched its analysis in terms of likelihood of certification under Section 1002(a)(3) instead of actual compliance under section 1002(a)(2), the court below rightly found as a matter of fact that the Rio fully satisfies the functions of SCMS. ER 128:8-129:3 (Order re PI).

c. **Certification Of Other Systems Prohibiting
Unauthorized Serial Copying Under Section
1002(a)(3).**

Section 1002(a)(3) provides that a device shall comply if it conforms to "any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying." The Commerce Department has established no procedure or regulations for certifications required under Section 1002(a)(3), just as it has failed to establish any verification procedure mandated by Section 1002(b).

The district court equitably and properly found that the Rio, if assessed by the Secretary of Commerce, would obtain certification under Section 1002(a)(3). ER 128:19-130:1 (Order re PI).

Plaintiffs challenge the district court's equitable discretion to make that finding. Instead, they argue for an inflexible, mandatory statutory requirement to impose an injunction for the "technical violation" of failure to have a certification, even though there is no procedure or regulation for obtaining such a certification. Plaintiffs misjudge the equitable nature of the relief they have requested, and they cannot prove harm from the "technical violation" that they argue.

Plaintiffs also object to the finding by invoking the doctrine of primary jurisdiction, arguing that the district court cannot consider the likelihood of the Secretary of Commerce's certification of the Rio's system of prohibiting unauthorized serial copying. Neither established case law construing the primary jurisdiction doctrine, including the cases cited by Plaintiffs, nor the provisions of the AHRA support Plaintiff's argument.

Plaintiffs initiated this proceeding in the court below without raising the question of primary jurisdiction. Now they question the lower court's ability to evaluate the issues and render a decision in proceedings they instigated. They offer no precedent for objection by a plaintiff to a court's decision-making authority on the basis of the primary jurisdiction doctrine.

As cited by Plaintiffs' brief, the Ninth Circuit has held that "[t]he primary jurisdiction doctrine is . . . essentially concerned with ensuring that administrative bodies possessed of both expertise and authority delegated by Congress pass on issues within their regulatory authority before consideration by the courts." United States v. General Dynamics Corp., 828 F.2d 1356, 1365 (9th Cir. 1987). The administrative agency's actual expertise in exercising decision making authority is

understandably an important factor in a court's determining whether it should relinquish its obligation to decide an issue and allow the agency to exercise its authority. See, e.g., Golden Hill Paugusett Tribe of Indians v. Weicker, 39 F.3d 51 59-60 (2d Cir. 1994) (determination of "tribe" status passed from courts to Board of Indian Affairs after Department of Interior created a "structured administrative process" and had developed experience and expertise); see also Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 96 S.Ct. 1978 (1976).

In this case, there is no reasonable argument that the Commerce Department has a "structured administrative process" with expertise or experience in assessing technology to prohibit unauthorized serial copying. The Commerce Department never established procedures or any regulations for SCMS equivalence verification mandated by Section 1002(b). There is no reason to vest primary jurisdiction in an agency that for six years has failed to carry out the relevant statutory mandate.

3. **The AHRA Cannot Constitutionally Prohibit Distribution of the Rio Music Player.**

a. **The First and Fifth Amendments Protect The Rio Against An Injunction.**

Music is a form of expression and communication protected by the free speech guarantees in the First Amendment to the United States Constitution. Ward v. Rock Against Racism, 491 U.S. 781, 789, 109 S.Ct. 2746, 2753 (1989); Cinevision Corp. v. City of Burbank, 745 F.2d 560, 567 (9th Cir. 1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2115 (1985); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 192 (Cal. Ct. App. 1988). The First Amendment protects all musical expression, regardless of whether the expression relates to citizen participation in public affairs. Cinevision Corp., 745 F.2d at 569.

Protection extends to the rights of the artist to communicate his or her expression, as well as the rights of the listener to receive it. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756, 96 S.Ct. 1817, 1823 (1976); Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440 (1976) (Powell, J., concurring). It covers not only the content of expression, but also the means used to disseminate and secure access to it. Wollam v. Palm

Springs, 379 P.2d 481, 486 (Cal. 1963); Weaver v. Jordan, 411 P.2d 289, 294 (Cal.), cert. denied, 385 U.S. 844, 87 S.Ct. 49 (1966).

Enforcement of the AHRA against distribution of the Rio would violate the First Amendment for a number of reasons. First, the Act is facially overbroad. In addition to prohibiting activities which may be constitutionally forbidden, it also includes within its coverage a serious restraint on technology for the lawful dissemination and receipt of musical expression protected by the First Amendment. The district court expressly found that the Rio will inevitably be used to record legitimate music and has significant beneficial uses. ER 130:20-131:11 (Order re PI). Because the overbreadth is real and substantial, and no suitable limiting construction of the statute is possible if it applies to the Rio, the AHRA is invalid. Tucker v. California Dep't of Ed., 97 F.3d 1204 (9th Cir. 1996) (declaring unqualified ban on religious advocacy by government employees overbroad); see also In Re Englebrecht, 67 Cal. App. 4th 486 (Cal. App. 4th Dist. 1998) (striking down ban on gang members' use of pagers and beepers).

Second, the AHRA, by failing to provide manufacturers clear guidance for compliance, is void for vagueness. It is a basic constitutional principle that

regulations must be sufficiently clear to avoid punishing people for behavior that they could not have known was illegal and to avoid subjective enforcement of laws based on arbitrary or discriminatory interpretations. United States v. Wunsch, 84 F.3d 1110 (9th Cir. 1996). Where, as here, First Amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required than under due process vagueness principles. Foti v. Menlo Park, 146 F.3d 629, 638 (9th Cir. 1988); see also N.A.A.C.P. v. Button, 371 U.S. 415, 432-33, 83 S.Ct. 328, 337-38 (1963) (First Amendment is independent source of vagueness doctrine).⁹

The AHRA, to pass muster under the vagueness doctrine, must give a person of ordinary intelligence adequate notice of the conduct it proscribes. Conlan v. U.S. Dep't of Labor, 76 F.3d 271 (9th Cir.), cert. denied, 519 U.S. 980, 117 S.Ct. 431 (1996). It does not. Neither Congress nor the Secretary of Commerce has enacted or implemented any statutory or regulatory definition of a key term in the AHRA:

⁹ The failure of the AHRA to give the public fair notice of what conduct it seeks to prohibit also violates the Due Process Clause of the Fifth Amendment. Manufacturers are protected by the Due Process Clause from arbitrary and discriminatory enforcement of vague standards. Grayned v. Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 2299 (1972); Kev. Inc. v. Kitsap County, 793 F.2d 1053, 1057 (9th Cir. 1986).

"Serial Copy Management System" or "SCMS." The Secretary of Commerce has not enacted or implemented any regulation, standard or procedure required by the AHRA for verifying SCMS equivalence pursuant to 17 U.S.C. § 1002(a)(2) and (b). Nor has the Secretary of Commerce enacted or implemented any regulation, standard or procedure for certifying devices pursuant to 17 U.S.C. § 1002(a)(3).

Third, the AHRA does not meet the requirements for content-neutral regulations that restrict protected expression. Such regulations may only be sustained if they are narrowly tailored to serve a significant government interest and they leave open ample alternative channels of communication. Ward, 491 U.S. at 791; S.O.C., Inc. v. Clark, 152 F.3d 1136, 1145 (9th Cir. 1998); Perry v. Los Angeles Police Dept., 121 F.3d 1365 (9th Cir. 1997), cert. denied, 118 S.Ct. 1362 (1998).

Insofar as the AHRA would cover the Rio, it is not narrowly tailored. A ban of the Rio would not focus specifically on the elimination of piracy, but would instead sweep broadly, without exceptions for substantial legitimate activity. Cf. California Satellite Sys. v. Seimon, 767 F.2d 1364 (9th Cir. 1985) (order carefully drawn so as not to restrict legitimate, noninfringing uses of radio equipment does

not conflict with First Amendment). The restriction would deprive musicians and small record companies of the ability to publish musical recordings on the Internet. At the same time, it would impair the public's right to secure convenient access to legitimate musical works made available only through Internet distribution. As the Supreme Court has declared, "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward, 491 U.S. at 799.

Nor would the application of the AHRA to ban the Rio leave open ample alternative channels of communication. Many musicians and small record companies look to the Internet as the single effective means of entry into the musical distribution business without significant barriers to entry posed by the cost of manufacturing plants and competition for shelf space in traditional retail stores. SER 20 (Caterine ¶¶ 5-6), 22, 25 (Kohn ¶¶ 2,16-17), 31-32 (Mudd ¶ 7), 36-37 (Robertson ¶¶ 1-5), 42-43 (Schatzkin ¶¶ 14-15,17,19). If the AHRA applies to the Rio, it denies the public an important means of accessing Internet music distribution and denies to many artists effective access to an audience for recorded music.

b. The AHRA is Unconstitutional as Unauthorized by the Copyright and Commerce Clauses.

The AHRA is unconstitutional because it has no foundation in either the Copyright Clause (Art. I, § 8, cl. 8) or the Commerce Clause (Art. I, § 8, cl. 3) of the Constitution.

Congress' authority to enact the AHRA cannot be founded on the Copyright Clause. The Constitution grants to Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., Art. I, § 8, cl. 8. The Supreme Court has recognized that "the monopoly privileges that Congress has authorized, while 'intended to motivate the creative activity of authors and inventors by the provision of a special reward,' are limited in nature and must ultimately serve the public good." Fogerty v. Fantasy, Inc., 510 U.S. 517, 526, 114 S.Ct. 1023, 1029 (1994) (quoting Sony Corp. v. Universal City Studios, 464 U.S. 417, 429, 104 S.Ct. 774, 782 (1983) ("Sony-Betamax")); see also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, 95 S.Ct. 2040, 2043 (1975) ("private motivation must ultimately serve the cause of promoting broad availability

of literature, music, and the other arts"); Fox Film Corp. v. Doyal, 286 U.S. 123, 127, 52 S.Ct. 546, 546 (1932).

The AHRA cannot be said to advance these limited interests. To the extent it bans technology that encourages musicians who lack mainstream record-label distribution to create works for Internet distribution, the AHRA is inimical to the Copyright Clause.

The record below contains substantial evidence of the importance of the Internet to the creative activity of new musicians and the activity of new record labels that promote them. See SER 20 (Caterine ¶¶ 5-6), 22, 25 (Kohn ¶¶ 2,16-17), 31-32 (Mudd ¶ 7), 36-37 (Robertson ¶¶ 1-5), 42-43 (Schatzkin ¶¶ 14-15,17,19). By denying them a creative outlet, application of the AHRA to prohibit the distribution of the Rio would do nothing to further the creative interests of mainstream artists who already have an arsenal of effective remedies under laws relative to copyright infringement. It would merely protect for them a competitive advantage over other artists who lack mainstream distribution channels.¹⁰ By impeding the dissemination

¹⁰ As the Sony-Betamax decision recognized, copyright owners may well have reasons for permitting certain kinds of copying to occur without receiving direct
(footnote continues next page)

of creative expression outside mainstream distribution channels the AHRA is contrary to the Copyright Clause.

Even the royalty provisions of the AHRA are contrary to the purposes of the Copyright clause. By securing for Plaintiffs what is essentially a royalty on sales of digital audio recording devices, it has the practical effect of extending their monopoly in protected *expression* to the manufacture, import and distribution of *technology*.

The Supreme Court addressed this very issue in Sony-Betamax, in the context of video tape recorders (VTRs):

It seems extraordinary to suggest that the Copyright Act confers upon all copyright owners collectively, much less the two respondents in this case, the exclusive right to distribute VTRs simply because they may be used to infringe copyrights. That, however, is the logical implication of their claim. The request for an injunction below

compensation. Id. 446 at n.28. "It is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights: even if [plaintiffs'] competitors were ill-advised in authorizing home [recording], that would not change the fact that they have created a substantial market for a paradigmatic non-infringing use of [defendant's] product." Id. Many recording artists are building audiences using the new MP3 media as a promotional vehicle. SER 39, 42 (Schatzkin ¶ 5 and 15). Preventing distribution of the Rio, which will play an important role in the burgeoning Internet music industry, would effectively allow one group of copyright interests to limit the exercise by other owners of their rights under the Copyright Act.

indicates that respondents seek, in effect, to declare VTRs contraband. Their suggestion in this court that a continuing royalty pursuant to a judicially created compulsory license would be an acceptable remedy merely indicates that respondents, for their part, would be willing to license their claimed monopoly interest in VTR's to petitioners in return for a royalty.

Sony-Betamax, 464 U.S. at 441, n. 21. Here, too, Congress lacks the constitutional power to grant to copyright owners a continuing royalty on digital audio recording devices simply because they *may* be used to copy works that are protected by copyright. Nothing in the Copyright Clause lends support to the grant of such expansive monopoly power.

Nor does the Commerce Clause save the AHRA in the absence of a Copyright Clause foundation. As the Supreme Court stated in striking down early federal trademark legislation:

When . . . Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress.

Trade-Mark Cases, 100 U.S. 82, 96 (1879).

The AHRA does not make clear on its face, or from its essential nature, that it is necessarily a regulation limited to interstate or foreign commerce. The statute bars manufacture and distribution of devices without SCMS or equivalent systems. 17 U.S.C. § 1002. "Manufacture," though, is defined so broadly to encompass even production or assembly of a device for personal use. See 17 U.S.C. § 1001(8) ("to produce or assemble a product in the United States"). Similarly, "distribute" is defined broadly enough to cover even transfer of devices within a state. See 17 U.S.C. § 1001(6) ("to sell, lease, or assign a product to consumers in the United States, or to sell, lease, or assign a product in the United States for ultimate transfer to consumers in the United States"). Where, as here, the statute restricts "commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress." Trade-Mark Cases, 100 U.S. at 96-97. As a consequence, Congress lacked authority under the Commerce Clause to enact the AHRA as written.

B. The District Court Acted Within its Discretion In Finding No Harm to Plaintiffs to Support a Preliminary Injunction.

1. Even if the Rio Player is Subject to the AHRA, and Violates It For Failure To Have A Certification, Such a "Technical" Violation Does Not Mandate a Preliminary Injunction.

Plaintiffs depend heavily upon an argument that the district court lacked discretion to refuse an injunction if a violation of the AHRA is shown, even if that violation were merely technical or *de minimis*.¹¹ Plaintiffs have relied upon a Sixth Circuit case reviewing a final judgment involving peculiar facts in a case of first impression under Michigan state law. The language of the AHRA and this court's precedents contradict Plaintiffs' argument.

The AHRA specifies "the court *may* grant temporary and permanent injunctions on such terms *as it deems reasonable* to prevent or restrain [a] violation." 17 U.S.C. § 1009(c)(1) (emphasis added). The legislative history of the

¹¹ Plaintiffs argue defendant technically violated the AHRA by its failure to receive certification of compliance with Section 1002(a)(3) from the Secretary of Commerce prior to distribution of the Rio player. At the time of the preliminary injunction motion no distribution had occurred. Since the district court's decision, the Rio has programmed SCMS into the Rio Manager software on the personal computer that manages the file transfer to the Rio player.

Act states injunctions under the AHRA are never mandatory: "Section 1009(c) permits, but does not mandate, the courts to issue temporary and permanent injunctions" H.R. Rep. 102-873(I) at 24. The district court is authorized to exercise its discretion in determining whether injunctive relief is appropriate according to traditional equitable considerations, including consideration of irreparable harm, when a violation of a statute occurs.

Courts have consistently found that "the grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." Miller v. Cal. Pac. Bell Med. Ctr., 19 F.3d 449, 457 (9th Cir. 1994) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313, 102 S.Ct. 1798, (1982)).

Federal law is replete with examples in which technical or *de minimis* violations do not require courts to grant injunctive relief. For example, although patent law on its face prohibits any and all uses of a patented invention, 35 U.S.C. § 271(a), injunctive relief is discretionary even if there was unauthorized use of the patented invention resulting in a technical violation. See Roche Prods. Inc. v. Bolar

Pharm. Co., Inc., 733 F.2d 858, 866-67 (Fed. Cir.), cert. denied, 469 U.S. 856, 105 S.Ct. 183 (1984)). Following the Supreme Court in Hecht Co. v. Bowles, 321 U.S. 321, 64 S.Ct. 587 (1944), the Roche court concluded that if the Supreme Court could exercise its equitable discretion and refuse to grant an injunction where statutory language mandated injunctions, permissive statutory language of the patent laws did not make injunction mandatory. Roche, 733 F.2d at 866-67. Indeed the court stated "if Congress wants the federal courts to issue injunctions without regard to historic equity principles, it is going to have to say so in explicit and even shameless language rarely if ever expected from a body itself made up very largely of American lawyers, having, probably, as much respect for traditional equity principles as do the courts." Id. at 867.

2. Plaintiffs Are Not Entitled to a Presumption of Irreparable Harm Under the AHRA.

Plaintiffs urge that a presumption of irreparable harm arises in all copyright cases once the plaintiff establishes a likelihood of success on the merits. As the district court noted, "It is undisputed that '[a] copyright plaintiff who makes out a prima facie case of *infringement* is entitled to a preliminary injunction without a

detailed showing of irreparable harm. Triad Systems Corp. v. Southeastern Express Co., 64 F.3d 1330, 1335 n. 9 (9th Cir. 1995) [cert. denied, 513 U.S. 1145, 116 S.Ct. 1015 (1996)]." ER 117:13-18 (Order re PI) (emphasis added by the district court). This rebuttable presumption is granted in cases of infringement because of the exclusivity of the copyright holder's rights and "[b]ecause the financial impact of copyright infringement is hard to measure and often involves intangible qualities such as consumer goodwill." Country Kids 'N City Clicks, Inc., v. Sheen, 77 F.3d 1280, 1288-89 (10th Cir. 1996).

This case does not involve any claim of copyright infringement. Moreover, the AHRA is very distinct from infringement provisions of the Copyright Act.

Under the AHRA, the copyright owner's right to exploit its work by copying is expressly *not* unique. The AHRA grants consumer the right to make unlimited personal copies of original musical works. Accordingly, the AHRA expressly forbids infringement actions based on the copying of music by consumers for personal use. 17 U.S.C. § 1008.

In light of the AHRA's express displacement of the copyright holder's exclusive right to copy, its unequivocal prohibition on suits for infringement arising

from the legalized copying, and its provision for financial compensation through royalty payments, the Plaintiffs' assertion that the same presumption of irreparable harm granted in infringement cases should arise in actions brought under the AHRA is groundless.

Moreover, assuming there were a rebuttable presumption of irreparable harm, it is available only to those plaintiffs who have demonstrated a probability of success on the merits. The district court correctly found that Plaintiffs did not demonstrate that probability. In any event, copyright law recognizes a *de minimis* exception to injunctive relief for copyright infringement. In Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824 (9th Cir. 1997), cert. denied, 118 S.Ct. 1795 (1998), a case cited by Plaintiffs, this court explained that the presumption of harm which arises in copyright infringement cases "is rebutted where the plaintiff has not been harmed, where any harm is *de minimis*, or where the defendant acted with innocent intent. . . ." Id. at 829 (citing Abend v. MCA, Inc., 863 F.2d 1465, 1478 (9th Cir. 1988), aff'd sub nom., Stewart v. Abend, 495 U.S. 207 (1990) (injunction not required because "the defendant had done nothing improper but had simply lost the right to [the work] on a 'technicality'"))).

3. The District Court Rightly Found No Harm From the Alleged Violation of the AHRA.

The district court correctly recognized that "for purposes of a preliminary injunction, the irreparable injury 'must be caused by the alleged wrongful conduct.'" ER 130 (Order re PI) (quoting Stanley v. University of So. Calif., 13 F.3d 1313, 1324-25) (9th Cir. 1994) (district court's emphasis deleted).

Plaintiffs assert they will be harmed by the Rio player. The district court rightly focused on whether there would be harm from the alleged violation--the absence of SCMS in the Rio. Judge Collins expressly found that a Rio with SCMS and a Rio without SCMS are functionally equivalent and that SCMS would have no practical effect on the Rio. ER 128:10-129:1 (Order re PI). Thus, the failure of the Rio to have SCMS cannot cause the harm alleged by Plaintiffs. Nor can the mere absence of a certification by the Secretary of Commerce cause the harm.

Plaintiffs claim that injury results because the Rio is "sold without any limit on what [it] can be used to copy" and "can and will be used to copy illicit MP3 files from the Internet without any capability to determine whether such copying is authorized." Appellants' Brief 41. The district court correctly found that the same

thing could occur even if the Rio had SCMS. ER 130: 24-26 (Order re PI). A personal computer is not a device that operates in conjunction with SCMS to allow a peripheral to "determine whether such copying is authorized."

Plaintiffs also argue that "the copy in the Rio device would be a second or higher generation copy, exactly the type of copy that the AHRA and its requirement of a serial copying prohibition are intended to prohibit." Appellants' Brief 42. Plaintiffs make a misleading use of the defined term "second-generation." The term "second-generation," as used in the SCMS Technical Reference Document describing the type of copy that the AHRA and its requirement of a serial copying prohibition are intended to prohibit, is the second copy *in a chain of reproductions which all contain the SCMS codes*. See H.R. Rep. 102-780(I) at 38 (Technical Reference Document). The district court found that the copy residing on the Rio player comes from a file without SCMS codes. The copy on the Rio would therefore be deemed an "original generation" under SCMS standards and is expressly authorized by SCMS. H.R. Rep. 102-780(I) at 43 ("Digital audio signals . . . that have no information concerning copyright and/or generation status shall be

[set by the receiving device] so that the digital copy is copyright asserted and original generation status").

Finally, Plaintiffs claim that the advent of portable digital listening devices for MP3 formatted audio, specifically the Rio player, will cause expansion in the market and in the demand for MP3 files and, with that expansion, stimulation of traffic in illegal MP3 files. Appellants' Brief 43. Plaintiffs' claims of the "upstream" effect of the Rio without SCMS on MP3 "piracy" are speculative and lack factual support. As the district court found, SCMS would make no difference to the Rio's function or effect.

Plaintiffs' argument is a broadside attack on the MP3 format and compression technology — but MP3 technology is not illegal contraband. Even if MP3 technology can be used to commit copyright infringement, there are substantial, and growing, lawful commercial uses for it. The district court found no causal link between the Rio's failure to have SCMS and any of the harms that Plaintiffs speculate about. Instead, it is the Rio device itself, and the concept of a portable MP3 music player, not the failure to incorporate SCMS, that Plaintiffs really attack because of their aversion to the MP3 format.

C. Plaintiffs Failed to Demonstrate Harm Sufficient to Outweigh Harm to Defendant and The Public.

Denying the preliminary injunction, the district court balanced the harm to Plaintiffs against the harm to Diamond Multimedia *and the public* if the Rio player's distribution were delayed during the pendency of this case.

Plaintiffs do not dispute Defendant's showing of harm from an injunction against distributing the Rio player. They rest solely upon the claimed "illegality" of the player and limit their focus to lost sales. Defendant's harms go beyond the anticipated lost profits from the sale of the Rio. They include loss of a wide range of benefits from being the first to market, including a reputation for innovation and technological achievement; goodwill from consumer awareness, favorable word-of-mouth, magazine reviews, and early market share leadership; and the spillover effect on other products. Moreover, a delay or interruption could kill the Rio product altogether. Similar actions by Plaintiffs to delay similar products from other vendors could fatally impair the market for this new technology, just as Plaintiffs' earlier efforts have caused digital audio tape to be a technology backwater in the marketplace. The pace of innovation and product introduction in

the computer industry is lightning fast and those who are delayed may never get into, or create, the market at all. SER 49 (Declaration of V. David Watkins ("Watkins") ¶ 4).

D. Public Interest Favors Distribution of the Rio Player.

The public interest favors distribution of the Rio player and would be harmed by an injunction in this case. First, the public has an interest in improved distribution of music and a wider choice of artists. SER 20-21 (Caterine ¶¶ 4-6), 25 (Kohn ¶ 16), 37 (Robertson ¶ 5), 43 (Schatzkin ¶ 19). Inhibiting the growth of the MP3 market by restricting the very tools that enable the public to participate in this emerging, legitimate market would deny artists access to audiences and prevent the broad public availability of new music, which is an ultimate aim of the copyright laws. SER 26 (Kohn ¶ 19).

Plaintiffs assert that the Rio will encourage infringement and that therefore its distribution would result in irreparable harm to Plaintiffs. The Court, in Sony-Betamax, stated that an injunction against videotape recorders, based on the possibility of infringing activities by others, would deprive the public of the ability to use the apparatus for non-infringing activities. Sony-Betamax, 464 U.S. at 443.

The Court confirmed that "[w]hatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some non-infringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law." Id. at 444 (quoting district court). The district court here likewise found that "because the Rio is capable of recording legitimate digital music, an injunction would deprive the public of a device with significant beneficial uses." ER 131:9-11 (Order re PI).

Second, the public interest is served by increased competitiveness and availability of new technologies. In enacting the AHRA Congress was responding to a chill that had fallen on the production of new technologies as a result of the longstanding conflict, and litigation, over the uses of digital audio tape for home taping. S. Rep. 102-780(I) at 18. Now, however, Plaintiffs are using the AHRA to attempt to ban the introduction of exciting new Internet music technology. Resolution of the competing interests of Plaintiffs and other industries in this arena may require a new legislative compromise, but it does not justify application of the AHRA far beyond its scope. The encouragement of competition in production of new technology is strongly in the public interest.

Finally, the public interest favors Congressional amendment to the copyright laws, rather than judicial expansion, in order to accommodate technological developments. The Supreme Court has forcefully stated that Congress, not the courts, must adapt copyright law to meet the challenges posed by new technology:

Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

Sony-Betamax, 464 U.S. at 430-431 (citations omitted). As instructed by the Supreme Court, the judiciary should not expand the scope of the AHRA to computer products like the Rio. Congress is better suited to accommodate numerous different interests, many of which are not represented in this proceeding, in creating new rules to address the distribution of music by computer.

CONCLUSION

The district court rightly found that the Rio neither violates the AHRA nor causes any justiciable harm. Moreover, the AHRA does not apply to the Rio and cannot constitutionally justify a prohibition against the Rio's distribution. This court should affirm with directions to the district court to dismiss Plaintiffs' claims and enter judgment for Diamond Multimedia Systems, Inc.

Respectfully submitted,

Dated: December 22, 1998

Wilson Sonsini Goodrich & Rosati
Professional Corporation

By: Andrew P. Bridges

Andrew P. Bridges
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STATEMENT OF RELATED CASES

Defendant-appellee is not aware of any related case pending before or previously heard by the United States Court of Appeal for the Ninth Circuit.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(3), I certify that the answering brief is proportionately spaced, has typeface of 14 points, and contains 12,850 words.

Dated: December 22, 1998

Wilson Sonsini Goodrich & Rosati
Professional Corporation

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ADDENDUM

§ 101 Definitions (excerpts)

As used in this title, the following terms and their variant forms mean the following:

A “computer program” is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.

“Literary works” are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

“Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

To “transmit” a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

17 U.S.C. § 101

CHAPTER 10. DIGITAL AUDIO RECORDING DEVICES AND MEDIA

SUBCHAPTER A. DEFINITIONS

Section

1001. Definitions

SUBCHAPTER B. COPYING CONTROLS

1002. Incorporation of copying controls

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1008. Prohibition on certain infringement actions

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HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1992. Act Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4237 (effective on enactment as provided by § 4 of such Act, which appears as 17 USCS § 1001 note), added this chapter and analysis.

CROSS REFERENCES

This chapter is referred to in 17 USCS §§ 801, 912.

SUBCHAPTER A. DEFINITIONS

§ 1001. Definitions

As used in this chapter [17 USCS §§ 1001 et seq.], the following terms have the following meanings:

(1) A “digital audio copied recording” is a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission.

(2) A “digital audio interface device” is any machine or device that is designed specifically to communicate digital audio information and related interface data to a digital audio recording device through a nonprofessional interface.

(3) A “digital audio recording device” is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for—

(A) professional model products, and

(B) dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds.

(4)(A) A “digital audio recording medium” is any material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device.

(B) Such term does not include any material object—

(i) that embodies a sound recording at the time it is first distributed by the importer or manufacturer; or

(ii) that is primarily marketed and most commonly used by consumers either for the purpose of making copies of motion pictures or other audiovisual works or for the purpose of making copies of nonmusical literary works, including computer programs or data bases.

(5)(A) A “digital musical recording” is a material object—

(i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and

(ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

(B) A “digital musical recording” does not include a material object—

(i) in which the fixed sounds consist entirely of spoken word recordings, or

(ii) in which one or more computer programs are fixed, except that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material.

(C) For purposes of this paragraph—

(i) a “spoken word recording” is a sound recording in which are fixed only a series of spoken words, except that the spoken words may be accompanied by incidental musical or other sounds, and

(ii) the term “incidental” means related to and relatively minor by comparison.

(6) “Distribute” means to sell, lease, or assign a product to consumers in

the United States, or to sell, lease, or assign a product in the United States for ultimate transfer to consumers in the United States.

(7) An “interested copyright party” is—

(A) the owner of the exclusive right under section 106(1) of this title to reproduce a sound recording of a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under this title that has been distributed;

(B) the legal or beneficial owner of, or the person that controls, the right to reproduce in a digital musical recording or analog musical recording a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under this title that has been distributed;

(C) a featured recording artist who performs on a sound recording that has been distributed; or

(D) any association or other organization—

(i) representing persons specified in subparagraph (A), (B), or (C), or

(ii) engaged in licensing rights in musical works to music users on behalf of writers and publishers.

(8) To “manufacture” means to produce or assemble a product in the United States. A “manufacturer” is a person who manufactures.

(9) A “music publisher” is a person that is authorized to license the reproduction of a particular musical work in a sound recording.

(10) A “professional model product” is an audio recording device that is designed, manufactured, marketed, and intended for use by recording professionals in the ordinary course of a lawful business, in accordance with such requirements as the Secretary of Commerce shall establish by regulation.

(11) The term “serial copying” means the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording. The term “digital reproduction of a digital musical recording” does not include a digital musical recording as distributed, by authority of the copyright owner, for ultimate sale to consumers.

(12) The “transfer price” of a digital audio recording device or a digital audio recording medium—

(A) is, subject to subparagraph (B)—

(i) in the case of an imported product, the actual entered value at United States Customs (exclusive of any freight, insurance, and applicable duty), and

(ii) in the case of a domestic product, the manufacturer’s transfer price (FOB the manufacturer, and exclusive of any direct sales taxes or excise taxes incurred in connection with the sale); and

(B) shall, in a case in which the transferor and transferee are related entities or within a single entity, not be less than a reasonable arms-length price under the principles of the regulations adopted pursuant to

section 482 of the Internal Revenue Code of 1986 [26 USCS § 482], or any successor provision to such section.

(13) A “writer” is the composer or lyricist of a particular musical work. (Added Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4237.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

In redesignating the Internal Revenue Code of 1954 as the Internal Revenue Code of 1986, Congress provided, in Act Oct. 22, 1986, P. L. 95-514, § 2, 100 Stat. 2095, for construction of references to the Internal Revenue Code as follows: except when inappropriate, any reference in any law, Executive Order, or other document to the Internal Revenue Code of 1954 shall include a reference to the Internal Revenue Code of 1986 and any reference to the Internal Revenue Code of 1986 shall include a reference to the provisions of law formerly known as the Internal Revenue Code of 1954.

Short title:

Act Oct. 28, 1992, P. L. 102-563, § 1, 106 Stat. 4237, provides: “This Act [adding 17 USCS §§ 1001 et seq., generally; for full classification, consult USCS Tables volumes] may be cited as the ‘Audio Home Recording Act of 1992’.”

Other provisions:

Effective date of Act Oct. 28, 1992. Act Oct. 28, 1992, P. L. 102-563, § 4, 106 Stat. 4248, provides: “This Act and the amendments made by this Act [for full classification, consult USCS Tables volumes] shall take effect on the date of the enactment of this Act.”

CROSS REFERENCES

This section is referred to in 17 USCS §§ 1006, 1007.

SUBCHAPTER B. COPYING CONTROLS

§ 1002. Incorporation of copying controls

(a) **Prohibition on importation, manufacture, and distribution.** No person shall import, manufacture, or distribute any digital audio recording device or digital audio interface device that does not conform to—

- (1) the Serial Copy Management System;
- (2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system’s method of serial copying regulation and devices using the Serial Copy Management System; or
- (3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

(b) **Development of verification procedure.** The Secretary of Commerce shall

establish a procedure to verify, upon the petition of an interested party, that a system meets the standards set forth in subsection (a)(2).

(c) Prohibition on circumvention of the system. No person shall import, manufacture, or distribute any device, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implements, in whole or in part, a system described in subsection (a).

(d) Encoding of information on digital musical recordings. (1) Prohibition on encoding inaccurate information. No person shall encode a digital musical recording of a sound recording with inaccurate information relating to the category code, copyright status, or generation status of the source material for the recording.

(2) Encoding of copyright status not required. Nothing in this chapter [17 USCS §§ 1001 et seq.] requires any person engaged in the importation or manufacture of digital musical recordings to encode any such digital musical recording with respect to its copyright status.

(e) Information accompanying transmissions in digital format. Any person who transmits or otherwise communicates to the public any sound recording in digital format is not required under this chapter [17 USCS §§ 1001 et seq.] to transmit or otherwise communicate the information relating to the copyright status of the sound recording. Any such person who does transmit or otherwise communicate such copyright status information shall transmit or communicate such information accurately.

(Added Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4240.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section is effective on enactment as provided by Act Oct. 28, 1992, P. L. 102-563, § 4, 106 Stat. 4248, which appears as 17 USCS § 1001 note.

CROSS REFERENCES

This section is referred to in 17 USCS §§ 1009, 1010.

SUBCHAPTER C. ROYALTY PAYMENTS

§ 1003. Obligation to make royalty payments

(a) Prohibition on importation and manufacture. No person shall import into and distribute, or manufacture and distribute, any digital audio recording device or digital audio recording medium unless such person records the notice specified by this section and subsequently deposits the statements of account and applicable royalty payments for such device or medium specified in section 1004.

(b) Filing of notice. The importer or manufacturer of any digital audio recording device or digital audio recording medium, within a product category

or utilizing a technology with respect to which such manufacturer or importer has not previously filed a notice under this subsection, shall file with the Register of Copyrights a notice with respect to such device or medium, in such form and content as the Register shall prescribe by regulation.

(c) **Filing of quarterly and annual statements of account.** (1) Generally. Any importer or manufacturer that distributes any digital audio recording device or digital audio recording medium that it manufactured or imported shall file with the Register of Copyrights, in such form and content as the Register shall prescribe by regulation, such quarterly and annual statements of account with respect to such distribution as the Register shall prescribe by regulation.

(2) Certification, verification, and confidentiality. Each such statement shall be certified as accurate by an authorized officer or principal of the importer or manufacturer. The Register shall issue regulations to provide for the verification and audit of such statements and to protect the confidentiality of the information contained in such statements. Such regulations shall provide for the disclosure, in confidence, of such statements to interested copyright parties.

(3) Royalty payments. Each such statement shall be accompanied by the royalty payments specified in section 1004.

(Added Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4240.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section is effective on enactment as provided by Act Oct. 28, 1992, P. L. 102-563, § 4, 106 Stat. 4248, which appears as 17 USCS § 1001 note.

CROSS REFERENCES

Copyright royalty arbitration, 17 USCS §§ 801 et seq.

This section is referred to in 17 USCS §§ 801, 1004, 1009, 1010.

§ 1004. Royalty payments

(a) **Digital audio recording devices.** (1) Amount of payment. The royalty payment due under section 1003 for each digital audio recording device imported into and distributed in the United States, or manufactured and distributed in the United States, shall be 2 percent of the transfer price. Only the first person to manufacture and distribute or import and distribute such device shall be required to pay the royalty with respect to such device.

(2) Calculation for devices distributed with other devices. With respect to a digital audio recording device first distributed in combination with one or more devices, either as a physically integrated unit or as separate components, the royalty payment shall be calculated as follows:

(A) If the digital audio recording device and such other devices are part

of a physically integrated unit, the royalty payment shall be based on the transfer price of the unit, but shall be reduced by any royalty payment made on any digital audio recording device included within the unit that was not first distributed in combination with the unit.

(B) If the digital audio recording device is not part of a physically integrated unit and substantially similar devices have been distributed separately at any time during the preceding 4 calendar quarters, the royalty payment shall be based on the average transfer price of such devices during those 4 quarters.

(C) If the digital audio recording device is not part of a physically integrated unit and substantially similar devices have not been distributed separately at any time during the preceding 4 calendar quarters, the royalty payment shall be based on a constructed price reflecting the proportional value of such device to the combination as a whole.

(3) Limits on royalties. Notwithstanding paragraph (1) or (2), the amount of the royalty payment for each digital audio recording device shall not be less than \$1 nor more than the royalty maximum. The royalty maximum shall be \$8 per device, except that in the case of a physically integrated unit containing more than 1 digital audio recording device, the royalty maximum for such unit shall be \$12. During the 6th year after the effective date of this chapter [Oct. 28, 1992], and not more than once each year thereafter, any interested copyright party may petition the Librarian of Congress to increase the royalty maximum and, if more than 20 percent of the royalty payments are at the relevant royalty maximum, the Librarian of Congress shall prospectively increase such royalty maximum with the goal of having no more than 10 percent of such payments at the new royalty maximum; however the amount of any such increase as a percentage of the royalty maximum shall in no event exceed the percentage increase in the Consumer Price Index during the period under review.

(b) Digital audio recording media. The royalty payment due under section 1003 for each digital audio recording medium imported into and distributed in the United States, or manufactured and distributed in the United States, shall be 3 percent of the transfer price. Only the first person to manufacture and distribute or import and distribute such medium shall be required to pay the royalty with respect to such medium.

(Added Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4241; Dec. 17, 1993, P. L. 103-198, § 6(b)(1), 107 Stat. 2312.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section is effective on enactment as provided by Act Oct. 28, 1992, P. L. 102-563, § 4, 106 Stat. 4248, which appears as 17 USCS § 1001 note.

Amendments:

1993. Act Dec. 17, 1993 (effective on enactment and applicable as provided by § 7 of such Act, which appears as 17 USCS § 801 note), in

subsec. (a)(3), substituted "Librarian of Congress" for "Copyright Royalty Tribunal" following "petition the", and substituted "Librarian of Congress" for "Tribunal" following "maximum, the".

CROSS REFERENCES

This section is referred to in 17 USCS §§ 1003, 1009.

§ 1005. Deposit of royalty payments and deduction of expenses

The Register of Copyrights shall receive all royalty payments deposited under this chapter [17 USCS §§ 1001 et seq.] and, after deducting the reasonable costs incurred by the Copyright Office under this chapter [17 USCS §§ 1001 et seq.], shall deposit the balance in the Treasury of the United States as offsetting receipts, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest under section 1007. The Register may, in the Register's discretion, 4 years after the close of any calendar year, close out the royalty payments account for that calendar year, and may treat any funds remaining in such account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the succeeding calendar year.

(Added Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4242; Dec. 17, 1993, P. L. 103-198, § 6(b)(2), 107 Stat. 2312.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**Effective date of section:**

This section is effective on enactment as provided by Act Oct. 28, 1992, P. L. 102-563, § 4, 106 Stat. 4248, which appears as 17 USCS § 1001 note.

Amendments:

1993. Act Dec. 17, 1993 (effective on enactment and applicable as provided by § 7 of such Act, which appears as 17 USCS § 801 note), deleted "The Register shall submit to the Copyright Royalty Tribunal, on a monthly basis, a financial statement reporting the amount of royalties under this chapter that are available for distribution." following "succeeding calendar year.".

CROSS REFERENCES

This section is referred to in 17 USCS 1006, 1009.

§ 1006. Entitlement to royalty payments

(a) Interested copyright parties. The royalty payments deposited pursuant to section 1005 shall, in accordance with the procedures specified in section 1007, be distributed to any interested copyright party—

(1) whose musical work or sound recording has been—

(A) embodied in a digital musical recording or an analog musical recording lawfully made under this title that has been distributed, and

(B) distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions, during the period to which such payments pertain; and

(2) who has filed a claim under section 1007.

(b) Allocation of royalty payments to groups. The royalty payments shall be divided into 2 funds as follows:

(1) The sound recordings fund. $66\frac{2}{3}$ percent of the royalty payments shall be allocated to the Sound Recordings Fund. $2\frac{5}{8}$ percent of the royalty payments allocated to the Sound Recordings Fund shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians or any successor entity) who have performed on sound recordings distributed in the United States. $1\frac{3}{8}$ percent of the royalty payments allocated to the Sound Recordings Fund shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists or any successor entity) who have performed on sound recordings distributed in the United States. 40 percent of the remaining royalty payments in the Sound Recordings Fund shall be distributed to the interested copyright parties described in section 1001(7)(C), and 60 percent of such remaining royalty payments shall be distributed to the interested copyright parties described in section 1001(7)(A).

(2) The musical works fund. (A) $33\frac{1}{3}$ percent of the royalty payments shall be allocated to the Musical Works Fund for distribution to interested copyright parties described in section 1001(7)(B).

(B)(i) Music publishers shall be entitled to 50 percent of the royalty payments allocated to the Musical Works Fund.

(ii) Writers shall be entitled to the other 50 percent of the royalty payments allocated to the Musical Works Fund.

(c) Allocation of royalty payments within groups. If all interested copyright parties within a group specified in subsection (b) do not agree on a voluntary proposal for the distribution of the royalty payments within each group, the Librarian of Congress shall convene a copyright arbitration royalty panel which shall, pursuant to the procedures specified under section 1007(c), allocate royalty payments under this section based on the extent to which, during the relevant period—

(1) for the Sound Recordings Fund, each sound recording was distributed in the form of digital musical recordings or analog musical recordings; and

(2) for the Musical Works Fund, each musical work was distributed in the

form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions.
(Added Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4242; Dec. 17, 1993, P. L. 103-198, § 6(b)(3), 107 Stat. 2312.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section is effective on enactment as provided by Act Oct. 28, 1992, P. L. 102-563, § 4, 106 Stat. 4248, which appears as 17 USCS § 1001 note.

Amendments:

1993. Act Dec. 17, 1993 (effective on enactment and applicable as provided by § 7 of such Act, which appears as 17 USCS § 801 note), in subsec. (c), in the introductory matter, substituted "Librarian of Congress shall convene a copyright arbitration royalty panel which" for "Copyright Royalty Tribunal".

CROSS REFERENCES

This section is referred to in 17 USCS § 1007.

§ 1007. Procedures for distributing royalty payments

- (a) **Filing of claims and negotiations.** (1) Filing of claims. During the first 2 months of each calendar year after the calendar year [1992] in which this chapter [17 USCS §§ 1001 et seq.] takes effect, every interested copyright party seeking to receive royalty payments to which such party is entitled under section 1006 shall file with the Librarian of Congress a claim for payments collected during the preceding year in such form and manner as the Librarian of Congress shall prescribe by regulation.
- (2) Negotiations. Notwithstanding any provision of the antitrust laws, for purposes of this section interested copyright parties within each group specified in section 1006(b) may agree among themselves to the proportionate division of royalty payments, may lump their claims together and file them jointly or as a single claim, or may designate a common agent, including any organization described in section 1001(7)(D), to negotiate or receive payment on their behalf; except that no agreement under this subsection may modify the allocation of royalties specified in section 1006(b).
- (b) **Distribution of payments in the absence of a dispute.** Within 30 days after the period established for the filing of claims under subsection (a), in each year after the year in which this section takes effect [1992], the Librarian of Congress shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Librarian of Congress determines that no such controversy exists, the Librarian of Congress shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a), after deducting its reasonable administrative costs under this section.

(c) **Resolution of disputes.** If the Librarian of Congress finds the existence of a controversy, the Librarian shall, pursuant to chapter 8 of this title [17 USCS §§ 801 et seq.], convene a copyright arbitration royalty panel to determine the distribution of royalty payments. During the pendency of such a proceeding, the Librarian of Congress shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall, to the extent feasible, authorize the distribution of any amounts that are not in controversy. The Librarian of Congress shall, before authorizing the distribution of such royalty payments, deduct the reasonable administrative costs incurred by the Librarian under this section.

(Added Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4244; Dec. 17, 1993, P. L. 103-198, § 6(b)(4), 107 Stat. 2312.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section is effective on enactment as provided by Act Oct. 28, 1992, P. L. 102-563, § 4, 106 Stat. 4248, which appears as 17 USCS § 1001 note.

Amendments:

1993. Act Dec. 17, 1993 (effective on enactment and applicable as provided by § 7 of such Act, which appears as 17 USCS § 801 note), in subsec. (a)(1), substituted “Librarian of Congress” for “Copyright Royalty Tribunal” following “with the” and substituted “Librarian of Congress” for “Tribunal” following “as the”; in subsec. (b), substituted “Librarian of Congress” for “Copyright Royalty Tribunal” following “effect, the” and substituted “Librarian of Congress” for “Tribunal” following “If the” and “exists, the”; in subsec. (c), substituted the sentence beginning “If the Librarian of Congress finds . . .” for “If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty payments.”, substituted “Librarian of Congress” for “Tribunal” in two places, and substituted “the reasonable administrative costs incurred by the Librarian” for “its reasonable administrative costs”.

CROSS REFERENCES

This section is referred to in 17 USCS §§ 804, 1005, 1006.

SUBCHAPTER D. PROHIBITION ON CERTAIN INFRINGEMENT ACTIONS, REMEDIES, AND ARBITRATION

§ 1008. Prohibition on certain infringement actions

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

(Added Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4244.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**Effective date of section:**

This section is effective on enactment as provided by Act Oct. 28, 1992, P. L. 102-563, § 4, 106 Stat. 4248, which appears as 17 USCS § 1001 note.

CROSS REFERENCES

Copyright infringement and remedies, generally, 17 USCS §§ 501 et seq.
This section is referred to in 19 USCS § 1337.

§ 1009. Civil remedies

(a) Civil actions. Any interested copyright party injured by a violation of section 1002 or 1003 may bring a civil action in an appropriate United States district court against any person for such violation.

(b) Other civil actions. Any person injured by a violation of this chapter [17 USCS §§ 1001 et seq.] may bring a civil action in an appropriate United States district court for actual damages incurred as a result of such violation.

(c) Powers of the court. In an action brought under subsection (a), the court—

- (1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain such violation;
- (2) in the case of a violation of section 1002, or in the case of an injury resulting from a failure to make royalty payments required by section 1003, shall award damages under subsection (d);
- (3) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof; and
- (4) in its discretion may award a reasonable attorney's fee to the prevailing party.

- (d) Award of damages.** (1) Damages for section 1002 or 1003 violations. (A) Actual damages. (i) In an action brought under subsection (a), if the court finds that a violation of section 1002 or 1003 has occurred, the court shall award to the complaining party its actual damages if the complaining party elects such damages at any time before final judgment is entered.
- (ii) In the case of section 1003, actual damages shall constitute the royalty payments that should have been paid under section 1004 and deposited under section 1005. In such a case, the court, in its discretion, may award an additional amount of not to exceed 50 percent of the actual damages.
- (B) Statutory damages for section 1002 violations. (i) Device. A complaining party may recover an award of statutory damages for each violation of section 1002 (a) or (c) in the sum of not more than \$2,500 per device involved in such violation or per device on which

a service prohibited by section 1002(c) has been performed, as the court considers just.

(ii) Digital musical recording. A complaining party may recover an award of statutory damages for each violation of section 1002(d) in the sum of not more than \$25 per digital musical recording involved in such violation, as the court considers just.

(iii) Transmission. A complaining party may recover an award of damages for each transmission or communication that violates section 1002(e) in the sum of not more than \$10,000, as the court considers just.

(2) Repeated violations. In any case in which the court finds that a person has violated section 1002 or 1003 within 3 years after a final judgment against that person for another such violation was entered, the court may increase the award of damages to not more than double the amounts that would otherwise be awarded under paragraph (1), as the court considers just.

(3) Innocent violations of section 1002. The court in its discretion may reduce the total award of damages against a person violating section 1002 to a sum of not less than \$250 in any case in which the court finds that the violator was not aware and had no reason to believe that its acts constituted a violation of section 1002.

(e) **Payment of damages.** Any award of damages under subsection (d) shall be deposited with the Register pursuant to section 1005 for distribution to interested copyright parties as though such funds were royalty payments made pursuant to section 1003.

(f) **Impounding of articles.** At any time while an action under subsection (a) is pending, the court may order the impounding, on such terms as it deems reasonable, of any digital audio recording device, digital musical recording, or device specified in section 1002(c) that is in the custody or control of the alleged violator and that the court has reasonable cause to believe does not comply with, or was involved in a violation of, section 1002.

(g) **Remedial modification and destruction of articles.** In an action brought under subsection (a), the court may, as part of a final judgment or decree finding a violation of section 1002, order the remedial modification or the destruction of any digital audio recording device, digital musical recording, or device specified in section 1002(c) that—

(1) does not comply with, or was involved in a violation of, section 1002, and

(2) is in the custody or control of the violator or has been impounded under subsection (f).

(Added Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4245.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section is effective on enactment as provided by Act Oct. 28, 1992,

P. L. 102-563, § 4, 106 Stat. 4248, which appears as 17 USCS § 1001 note.

CROSS REFERENCES

This section is referred to in 17 USCS § 1010.

§ 1010. Arbitration of certain disputes

(a) **Scope of arbitration.** Before the date of first distribution in the United States of a digital audio recording device or a digital audio interface device, any party manufacturing, importing, or distributing such device, and any interested copyright party may mutually agree to binding arbitration for the purpose of determining whether such device is subject to section 1002, or the basis on which royalty payments for such device are to be made under section 1003.

(b) **Initiation of arbitration proceedings.** Parties agreeing to such arbitration shall file a petition with the Librarian of Congress requesting the commencement of an arbitration proceeding. The petition may include the names and qualifications of potential arbitrators. Within 2 weeks after receiving such a petition, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of an arbitration proceeding. Such notice shall include the names and qualifications of 3 arbitrators chosen by the Librarian of Congress from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Librarian of Congress shall select, and from potential arbitrators listed in the parties' petition. The arbitrators selected under this subsection shall constitute an Arbitration Panel.

(c) **Stay of judicial proceedings.** Any civil action brought under section 1009 against a party to arbitration under this section shall, on application of one of the parties to the arbitration, be stayed until completion of the arbitration proceeding.

(d) **Arbitration proceeding.** The Arbitration Panel shall conduct an arbitration proceeding with respect to the matter concerned, in accordance with such procedures as it may adopt. The Panel shall act on the basis of a fully documented written record. Any party to the arbitration may submit relevant information and proposals to the Panel. The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct.

(e) **Report to Librarian of Congress.** Not later than 60 days after publication of the notice under subsection (b) of the initiation of an arbitration proceeding, the Arbitration Panel shall report to the Librarian of Congress its determination concerning whether the device concerned is subject to section 1002, or the basis on which royalty payments for the device are to be made under section 1003. Such report shall be accompanied by the written record, and shall set forth the facts that the Panel found relevant to its determination.

(f) **Action by the Librarian of Congress.** Within 60 days after receiving the

report of the Arbitration Panel under subsection (e), the Librarian of Congress shall adopt or reject the determination of the Panel. The Librarian of Congress shall adopt the determination of the Panel unless the Librarian of Congress finds that the determination is clearly erroneous. If the Librarian of Congress rejects the determination of the Panel, the Librarian of Congress shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting forth the Librarian's decision and the reasons therefor. The Librarian of Congress shall cause to be published in the Federal Register the determination of the Panel and the decision of the Librarian of Congress under this subsection with respect to the determination (including any order issued under the preceding sentence).

(g) Judicial review. Any decision of the Librarian of Congress under subsection (f) with respect to a determination of the Arbitration Panel may be appealed, by a party to the arbitration, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. The pendency of an appeal under this subsection shall not stay the decision of the Librarian of Congress. The court shall have jurisdiction to modify or vacate a decision of the Librarian of Congress only if it finds, on the basis of the record before the Librarian of Congress, that the Arbitration Panel or the Librarian of Congress acted in an arbitrary manner. If the court modifies the decision of the Librarian of Congress, the court shall have jurisdiction to enter its own decision in accordance with its final judgment. The court may further vacate the decision of the Librarian of Congress and remand the case for arbitration proceedings as provided in this section.

(Added Oct. 28, 1992, P. L. 102-563, § 2, 106 Stat. 4246; Dec. 17, 1993, P. L. 103-198, § 6(b)(5), 107 Stat. 2312.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section is effective on enactment as provided by Act Oct. 28, 1992, P. L. 102-563, § 4, 106 Stat. 4248, which appears as 17 USCS § 1001 note.

Amendments:

1993. Act Dec. 17, 1993 (effective on enactment and applicable as provided by § 7 of such Act, which appears as 17 USCS § 801 note), in subsec. (b), substituted "Librarian of Congress" for "Copyright Royalty Tribunal" following "with the" and substituted "Librarian of Congress" for "Tribunal" following "petition, the", "chosen by the", and "as the"; in subsec. (e), in the heading and in the text, substituted "Librarian of Congress" for "Copyright Royalty Tribunal"; in subsec. (f), in the heading, substituted "Librarian of Congress" for "Copyright Royalty Tribunal" and, in the text, substituted "Librarian of Congress" for "Copyright Royalty Tribunal" following "subsection (e), the", substituted "the Librarian's" for "its", and substituted "Librarian of Congress" for "Tribunal" following "unless the", "If the", "Panel, the", and "therefor. The"; and, in subsec. (g), substituted "Librarian of Congress"

17 USCS § 1010

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for "Copyright Royalty Tribunal" following "Any decision of the", substituted "decision of the Librarian of Congress" for "Tribunal's decision", and substituted "Librarian of Congress" for "Tribunal" following "a decision of the", "before the", "or the", "modifies the decision of the", and "vacate the decision of the".

CROSS REFERENCES

Copyright royalty arbitration, generally, 17 USCS §§ 801 et seq.

the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow Money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To Establish Post Offices and Post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

Technology must certify that the initial Technical Reference Document is in accord with existing technology.

SUBCHAPTER D—REMEDIES

Section 1031. Civil remedies

Section 1031 provides standards and procedures for civil suits for damages and equitable injunctive relief. Suits may be brought in the U.S. district court.

Section 1032. Binding arbitration

Section 1032 establishes procedures for binding arbitration to settle disputes, if the parties agree to such procedures.

Section 3. Technical amendments

Section 3 makes technical amendments.

Section 4. Effective date

This provides that the effective date of this chapter is the date of enactment of this Act.

TECHNICAL REFERENCE DOCUMENT FOR THE AUDIO HOME RECORDING ACT OF 1992

INTRODUCTION

This Technical Reference Document is provided to facilitate the implementation of legislation relating to digital audio recording ("DAR") devices, known as the "Audio Home Recording Act of 1992" ("the Act").

This Technical Reference Document establishes the standards and specifications that are necessary to implement the Serial Copy Management System ("SCMS") under the Act. It draws in part from specifications proposed to the International Electrotechnical Commission ("IEC") in "IEC 958: Digital Audio Interface" (First edition 1989-03) and "Amendment No. 1 to IEC 958 (1989): Digital Audio Interface, Serial Copy Management System" (Reference 84(CO)126 submitted on June 21, 1991) (collectively, "IEC 958"), and "IEC 60A(CO) 136 Part 6: Serial copy management system for consumer audio use DAT recorders." The standards and specifications set forth herein relate only to the implementation of SCMS via digital audio interface signals, DAR devices and digital audio interface devices. The standards and specifications set forth herein, as they may be amended pursuant to an order of the Secretary of Commerce under Section 1022(b) of Subchapter C of the Act, shall be considered determinative under the Act, regardless of any future action by the IEC or by a manufacturer or by an owner of a proprietary technology.

SCMS is intended to prohibit DAR devices from recording "second-generation" digital copies from "first-generation" digital copies containing audio material over which copyright has been asserted via SCMS. It does not generally restrict the ability of such devices to make "first-generation" digital copies from "original" digital sources such as prerecorded commercially available compact discs, digital transmissions of digital tapes.

Currently, the predominant type of DAR device offered for sale in the United States is the DAT recorder, which records and sends digital signals in accordance with the IEC 958 nonprofessional digital audio interface format. Additional types of DAR devices and interface formats are being or may be developed. The standards and specifications in this Technical Reference Document are not intended to hinder the development of such new technologies but require, in accordance with Section 1021 (a)(1)(A)-(C) of Subchapter C of the Act, that they incorporate the functional characteristics of SCMS protection. In order for a DAR device to be "compatible with the prevailing method of implementing SCMS," to the extent DAR devices are capable of recording signals sent in a particular digital audio interface signal format, the SCMS information must be accurately received and acted upon by the DAR device so as to correctly implement the same level of SCMS protection provided by that format. "Compatibility" does not require direct bit-for-bit correspondence across every interface signal format; indeed, particular interface signal formats may be recordable by some, but not all, DAR devices. To the extent that any digital audio interface device translates and sends signals in a form that can be recorded by a particular DAR device, however, "compatibility" requires that the SCMS information also be accurately translated and sent by the interface device, and accurately read and acted upon by the DAR device.

This document is in three parts. Part I Section A sets forth standards and specifications constituting the functional characteristics for implementing SCMS in digital audio interface signals. Sections B and C then apply these standards and specifications in a specific reference for implementing SCMS in the IEC 958 nonprofessional digital audio interface format. Part II Section A similarly first sets forth standards and specifications constituting the functional characteristics for implementing SCMS in DAR devices. Sections B and C then apply these standards and specifications in a specific reference for implementing SCMS with respect to the recording and play-back functions of non-professional model DAT recorders. Part III contains a series of charts that apply and correlate those codes that are mandated for implementation in DAT recorders by Parts I-C and II-C of this document.

The terms "digital audio interface device," "digital audio recording device," "digital audio recording medium," "distrubite," "professional model," and "transmission" as used in this document have the same meanings as in the Act. "Generation status" means whether the signal emanates from a source that has been produced or published by or with the authority of the owner of the material, such as commercially released pre-recorded compact discs or digital tapes or a digital transmission (referred to herein as "original"); or whether the signal emanates from a recording made from such "original" material.

Part I. Implementation of SCMS in Digital Audio Interface Formats

Various consumer devices are capable of producing digital audio signals. Currently, for example, compact disc players, DAT record-

ers and analog-to-digital converters can send digital audio signals; future devices may include digital microphones or recordable compact disk devices. To enable communication between these different types of devices and a DAR device, it is necessary and desirable to establish common protocols or "interfaces" that mandate specific information in the digital audio output signal of each device. Digital signal interfaces may enable communication of different types of data. A "digital audio interface signal" communicates audio and related interface data as distinguished from, for example, computer or video data. Digital audio interface signal formats may be established for particular types of devices or uses. For example, interface protocols may exist for broadcast use, or for users of professional model products ("professional interface") or for nonprofessional model products ("nonprofessional interface"). One such set of protocols already has been established in the document IEC 958. Sections B and C of Part I summarize and mandate the implementation of SCMS in the IEC 958 nonprofessional interface.

Section A sets forth the standards and specifications for implementing SCMS in digital audio interface signals and devices.

A. Digital audio interface standard

To implement the functional characteristics of SCMS in nonprofessional digital audio interface signal formats, whether presently known or developed in the future, the following conditions must be observed:

1. The digital audio interface format shall provide a means to indicate:

(a) Whether or not copyright protection is being asserted via SCMS over the material being sent via the interface; and,

(b) Whether or not the generation status of the material being sent via the interface is original.

2. If the digital audio interface format has discrete professional and nonprofessional modes, the interface format and digital audio interface devices shall indicate accurately the professional or nonprofessional status of the interface signal. Such indication is referred to generically as a "channel status block flag".

3. If the interface format has a discrete mode for sending data other than audio material, the interface format shall indicate accurately whether or not the interface signal contains audio material.

4. If a digital audio interface device is capable of combining more than one digital audio input signal into a single digital audio output signal, and if copyright is asserted via SCMS over the material being sent in at least one of the input signals, then the device shall indicate in the output signal that copyright is asserted over the entire output signal. If copyright protection is asserted via SCMS over any of the input signals, and the generation status of that copyright-asserted signal is not original, then the entire output signal shall indicate that copyright is asserted and that the generation status is not original.

5. Devices that are capable of reading original recordings and/or DAR media, and that are capable of sending digital audio signals that can be recorded by a DAR device, shall accurately read the copyright and generation status information from the media and accurately send that information.

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6. Devices having a nonprofessional digital audio interface shall receive and accurately send the copyright and generation status information.

7. Professional devices that are capable of sending audio information in a nonprofessional digital audio interface format shall send SCMS information as implemented for that format. However, nothing shall prevent professional devices and/or recording professionals engaged in a lawful business from setting SCMS information according to the needs of recording professionals.

8. If the audio signal is capable of being recorded by a DAR device and the interface format requires an indication of the type of device sending the signal via the interface, then the device shall send the most accurate and specific designation applicable to that device; for example, "Category Codes" as set forth in Part I with reference to the IEC 958 nonprofessional interface.

9. Devices that receive digital audio transmissions sent without copyright and generation status information shall indicate that copyright is asserted over the transmitted audio material and that the generation status is original. If the transmitting entity wishes to transmit copyright status information it shall do so accurately, and the information shall accurately be received and sent unaltered by the receiving device. In the case of Electronic Audio Software Delivery signal transmissions, the receiver shall accurately receive generation status information as sent by the transmitting entity so as to permit or restrict recording of the transmitted signals. "Electronic Audio Software Delivery" refers to a type of transmission whereby the consumer interactively determines what specific work(s) and/or event(s) are received. This includes, for example, "audio on demand" (electronic selection and delivery of sound recordings for copying) or "pay-per-listen" reception, as distinguished from regular broadcast or comparable cable radio programming services.

10. (a) If the digital audio portion of an interface signal format is recordable by a "pre-existing" type of DAR device, i.e., one that was distributed prior to the distribution of the interface signal format, then the signal format shall implement the rules of SCMS so that the pre-existing DAR device will act upon the rules of SCMS applicable to that DAR device.

(b) If a type of DAR device is capable of recording the digital audio portion of signals sent by a pre-existing digital audio interface device, then the DAR device shall implement the rules of SCMS so that the DAR device will act upon the rules of SCMS applicable to that pre-existing digital audio interface device's format.

(c) If a digital audio interface device is capable of translating a signal from one interface format to another, then the device also shall accurately translate and send the SCMS information.

B. Summary of SCMS implementation in the IEC 958 digital audio interface

Under IEC 958, SCMS is implemented via inaudible information, known as "channel status data", that accompanies a digital audio signal being sent to or by a DAR device via a nonprofessional digital audio interface. Like all digital data, channel status data consist of numerical information encoded as a series of zeros and ones.

Each zero or one constitutes a "bit" of data in which both zero and one may impart information concerning the composition of the audio signal being sent to or by a DAR device. Bits represented in this Technical Reference Document as "X", rather than as zero or one, indicate that those bits may be either zero or one without affecting the specifications set forth herein.

Channel status data bits are organized into units of information, known as "blocks," relating to both the left and right stereo audio channels. Each block contains 192 bits of information, numbered consecutively from 0 to 191. Those channel status bits that are significant to the implementation of SCMS via the IEC 958 interface are included within channel status bits 0 through 15. Certain of these 16 bits identify professional or nonprofessional interfaces; some specify copyright assertion; and some identify the generation number of a recording. The remaining bits are "Category Codes" that describe the type of device sending the digital audio signal. More complete descriptions of these channel status bits are set forth in the remaining sections of this Part I.

IEC 958 defines professional and nonprofessional interface formats for digital audio signals. An IEC 958 professional interface contains particular types of channel status data for such digital audio recording devices as would be used in professional model products. An IEC 958 nonprofessional interface contains different types of channel status data. The channel status data sent in a nonprofessional interface are incompatible with the channel status data in a professional interface; a DAR device cannot correctly read the channel status data sent in a professional interface.

The specifications summarized herein and mandated in Section C apply only to devices that send or read an IEC 958 nonprofessional interface signal. To the extent that a professional device also may have a IEC 958 nonprofessional interface, such a professional device must be capable of sending channel status data via its nonprofessional interface in accordance with the standards set forth herein. However, nothing in this Technical Reference Document shall be interpreted to prevent a professional device having an IEC 958 nonprofessional interface and/or recording professionals engaged in a lawful business from permitting such channel status data bits to be set in accordance with the needs of recording professionals.

All devices having a digital audio output capable of supplying a digital audio signal to a DAR device through an IEC 958 nonprofessional interface must implement five types of codes located between Channel Status Bits 0 and 15. For the IEC 958 interface format, Channel Status Bits 0 through 15 are supplied in a digital audio output signal to a DAR device as follows:

1. Bit 0. Bit 0 (the "Channel Status Block Flag"), one of the "Control" bits, shall identify whether the channel status bits are for a professional or nonprofessional interface. Where Bit 0 is set as "1", the signal contains the channel status data required for a professional interface. Where Bit 0 is set as "0", the channel status data is suitable for a nonprofessional interface. The remaining bit assignments are mandated only with respect to a nonprofessional interface, i.e., where Bit 0 is set as "0".

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2. Bit 1. Bit 1, another of the "Control" bits, shall identify whether the signal being sent to or by the DAR device is a digital audio or a digital data signal. Where Bit 1 is set as "0", the signal is a digital audio signal. Where Bit 1 is set as "1", the signal is a digital data signal.

3. Bit 2. Bit 2 (the "C" Bit), another of the "Control" bits, shall identify whether copyright protection is asserted for the audio material being sent via the digital audio signal. Where the C Bit is set as "0", copyright protection has been asserted over the material being sent to the digital audio input of the DAR device. Where the C Bit is set as "1", either that material is not protected by copyright or no copyright protection has been asserted by the owner of that material.

There are specific applications of the C Bit for three types of devices, as follows:

- Compact disc players compatible with the standards set forth in IEC 908 (compact disc standard, Category Code 10000000) in effect as of the date of enactment of the Act indicate in the C Bit both the copyright and generation status of the signal. (See description of "Bit 15", *infra*.) Where the signal is original and copyright protection has been asserted, the C Bit = "0". Where no copyright protection has been asserted, the C Bit = "1". Where the signal is first-generation and copyright protection has been asserted, the C Bit will fluctuate between "0" and "1" at a rate of between 4-10 Hz.
- Digital Receivers (Category Codes 001XXXXL and 0111XXXXL) shall set the C Bit as "0", except that these devices shall send the C Bit as "1" only where the cable operator, broadcaster or other entity specifically transmits information indicating that no copyright protection has been asserted over the material.
- Devices that combine digital audio input signals into one digital audio output signal (e.g., digital signal mixing devices) shall reflect whether copyright protection has been asserted in the C Bit for at least one of the input signals by setting the C bit as "0" in the resulting digital audio output signal.

Devices in the Category Codes for General ("00000000") and Present A/D Converters ("01100XXX") are not capable of sending copyright status information in the C Bit. The C Bit in the channel status data sent by these devices has no meaning.

There is no existing legal requirement that a copyright owner must assert protection over its material (and, therefore, set the C Bit as "0"). However, except as provided herein with respect to implementation in Digital Receivers (category codes 001XXXXL and 0111XXXXL), a copyright owner may not set the C Bit as "0" for material that is not copyrighted or is in the public domain.

4. Bits 3-7. These bits are sent to and read by a DAR device, but specific bit settings for Bits 3-7 are not necessary for the implementation of SCMS. (Bits 6-7 are Music Production Program Block ("MPPB") flag bits.)

5. Bits 8-14. Bits 8-14 shall specify a "Category Code" that identifies the type of device that produces the digital audio signal sent to or by a DAR device. Using various combinations of zeros and ones, Bits 8-14 can define Category Codes for as many as 128 different devices that can provide digital audio signals to a DAR device.

According to IEC 958, the first three to five Category Code bits (numbered Bits 8-10 through 8-12) describe general product groups, and the remaining Category Code bits specify particular devices within each product group. IEC 958 has assigned particular Category Codes to existing and anticipated product groups and devices, and has reserved additional Category Codes for future devices.

The Category Code issued by each particular device must reflect the most specific code applicable to that device, with the following exceptions:

- Digital signal processing and mixing products receive digital audio signals from one or more sources and either process or combine them with other incoming digital audio signals. If all input signals come from analog-to-digital converters having a Category Code "01100XXX", these devices should issue the Category Code of an analog-to-digital converter rather than of the digital signal processing or mixing device.
- Sampling rate converters and digital sound samplers come under the Category Codes for digital-to-digital converters. If an input signal to a sampling rate converter or digital sound sampler comes from an analog-to-digital converter having a Category Code "01100XXX", the sampling rate converter or digital sound sampler should issue the Category Code of the analog-to-digital converter.

These exception cases will permit two generations of digital copies from analog recordings, which currently is permitted under SCMS.

The relevance of these Category Codes to SCMS as implemented for devices having the IEC 958 nonprofessional interface is described in Section C and, specifically as to DAT recorders, in Part II Sections B and C.

6. Bit 15. Bit 15 (the "L" Bit) shall indicate the "generation status" of the digital audio signals being sent to or by a DAR device. "Generation status" means whether the signal emanates from a source that has been produced or published by or with the authority of the owner of the material, such as commercially released pre-recorded compact discs or digital tapes or a digital transmission (referred to herein as "original"); or whether the signal emanates from a recording made from such "original" material. In the latter case, a recording made directly from an "original" source is known as a "first-generation" copy; a recording made from a first-generation copy is a "second-generation" copy; and so forth. Because there is no restriction on the number of copies that can be made from material over which no copyright protection has been asserted, generation status is relevant only where copyright protection has been asserted over the signal.

For most products, if the L Bit is set as "0", the source is a recording that is first-generation or higher. If the L Bit is set as "1", the source is "original." There are four specific categories of products which indicate generation status differently, as follows:

- Compact disc players compatible with the specifications in IEC 908 (Category Code 10000000) are incapable of controlling the L Bit. These products signal generation status solely by means of the C Bit (Bit 2).

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- Digital audio output signals from all other laser-optical products (Category Code 100XXXXL) shall send the L Bit as "0" for "original" material and the L Bit as "1" for first-generation or higher recordings.
- Digital Receivers (Category Codes 001XXXXL and 0111XXXXL) shall set the L Bit as "0"; except in the case of receivers for Electronic Audio Software Delivery, which receivers shall send the L Bit as "1" only where the entity specifically transmits information indicating that the material should be treated as if it were first-generation or higher.
- Devices that combine more than one digital audio input signal into one digital audio output signal, such as digital signal processors or mixers, shall reflect in the L Bit of the output signal the highest generation status of any input containing material over which copyright protection has been asserted. Thus, where one or more of the constituent input signals contains material that is not original (i.e., a first-generation copy) and over which copyright protection is asserted, then the device must reflect in the L Bit of the digital audio output signal a non-original generation status. In all other cases, the device shall reflect in the L Bit that the output signal is original.

C. Mandatory specifications for implementing SCMS in the IEC 958 digital audio interface

The following bit assignments for channel status data, as referenced in the provisions of IEC 958 ¶ 4.2.2 "Channel status data format for digital equipment for consumer use", shall be mandatory for devices implementing the IEC 958 interface:

1. Bits 0-2 of the "CONTROL" Bits:
 - a. Bit 0 ("the "Channel Status Block Flag"):
 Bit 0 = "0"—Nonprofessional interface.
 Bit 0 = "1"—Professional interface.
 - b. Bit 1:
 Bit 1 = "0"—Digital audio signals.
 Bit 1 = "1"—Non-audio (data) signals.
 - c. Bit 2 (the "C" Bit):
 - i. Case 1:
 Bit 2 = "0"—Copyright protection asserted.
 Bit 2 = "1"—No copyright protection asserted or not under copyright.
 - ii. Case 2—Compact Disc Players.—For compact disc players compatible with IEC 908 (Category Code 10000000), the C Bit shall indicate:
 Bit 2 = "0"—Copyright protection asserted and generation status is "original".
 Bit 2 = "1"—No copyright protection asserted.
 Where the Bit 2 fluctuates between "0" and "1" at a rate between 4-10 Hz, copyright protection has been asserted and the signal is first-generation or higher.
 - iii. Case 3—Digital Receivers.—For Digital Receivers (Category Codes 001XXXXL and 0111XXXXL), the C Bit shall indicate, where copyright information is transmitted to the digital receiver:
 Bit 2 = "0"—Copyright protection asserted.

Bit 2 = "1"—No copyright protection asserted.

Where no copyright information is transmitted to the receiver, the digital receiver shall set the C Bit as "0".

iv. Case 4—Digital Signal Mixers.—Where a single digital audio output signal results from the combination of more than one digital audio input signal:

Bit 2 = "0"—Copyright protection asserted over at least one of the constituent digital audio input signals.

Bit 2 = "1"—For all of the constituent digital audio input signals, no copyright protection asserted or not under copyright.

v. Exception Case.—The C Bit has no meaning for A/D converters for analog signals that do not include status information concerning the C Bit and the L Bit (i.e., A/D converters in Category Code 01100XXX).

2. Bits 3-7: Specific bit settings for Bits 3-7 are not necessary for the implementation of SCMS.

3. Category Code Bits 8-15:

a. Bits 8-15

The Category Codes that follow are established for particular product groups. Where Bit 15 is represented by "L" rather than a zero or one, Bit 15 (the "L" Bit) can be either a zero or one without affecting the Category Code. Where Bit 15 is represented by "X" rather than a zero or one, the device is not capable of issuing status information concerning the L Bit.

00000000—General. This category applies to products that are capable of sending channel status data but are not programmed to send such data in accordance with the specifications set forth in this Technical Reference Document because the products were manufactured before the effective date of the Act. This General Category Code shall not be used for products manufactured after the effective date of the Act.

0000001L—Experimental products not for commercial sale.

100XXXXL—Laser-optical products, such as compact disc players (including recordable and erasable compact disk players) and video-disc players with digital audio outputs.

010XXXXL—Digital-to-digital ("D/D") converters and signal processing products.

110XXXXL—Magnetic tape or disk based products, such as DAT players and recorders.

001XXXXL and 0111XXXXL—Receivers of digitally-encoded audio transmissions with or without video signals.

101XXXXL—Musical instruments, microphones and other sources that create original digital audio signals.

01100XXX—Analog-to-digital ("A/D") converters for analog signals without status information concerning the C Bit and the L Bit ("Present A/D converters").

01101XXL—A/D converters for analog signals which include status information concerning the C Bit and the L Bit ("Future A/D converters").

0001XXXXL—Solid state memory based media products.

Particular devices within each product group defined above shall be assigned specific Category Codes in accordance with IEC 958. Manufacturers of any device that is capable of supplying a digital

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audio input to a DAR device must use the most specific Category Code applicable to that particular device. However, digital signal processing or digital signal mixing products in Category Code product group "010XXXXL" shall issue the Category Code for Present A/D converters where all the input signals have the Category Code for a Present A/D converter. Similarly, sampling rate converters in Category Code "0101100L" and digital sound samplers in Category Code "0100010L" shall issue the Category Code for Present A/D converters where the input signal comes from a Present A/D converter.

b. Bit 15 (the "L" Bit): The L Bit shall be used to identify the generation status of the digital input signal as emanating from an "original" source or from a non-original (i.e., first-generation or higher) recording.

1. Case 1—General Case.—For all Category Codes (except as explicitly set forth below), the L Bit shall indicate:

Bit 15 = "0"—First-generation or higher recording.

Bit 15 = "1"—"Original" source, such as a commercially released pre-recorded digital audiogram.

2. Case 2—*Laser Optical Products*.—The reverse situation is valid for laser optical products (Category Code 100XXXXL), other than compact disc players compatible with IEC 908 (Category Code 10000000). For laser optical products in Category Code 100XXXXL, the L Bit shall indicate:

Bit 15 = "1"—First-generation or higher recording.

Bit 15 = "0"—"Original" recording, such as a commercially released pre-recorded compact disc.

3. Case 3—*Digital Receivers*.—For Digital Receivers (Category Codes 001XXXXL and 0111XXXXL), Bit 15 always shall be set as "0"; except for receivers for Electronic Audio Software Delivery, for which the L Bit shall indicate:

Bit 15 = "0"—Generation status information transmitted as "original" material.

Bit 15 = "1"—Generation status information transmitted as for non-original material, or no generation status information transmitted.

4. Case 4—*Digital Signal Mixers*.—Where a single digital audio output signal results from the combination of more than one digital audio input signal:

Bit 15 = "0"—One or more of those constituent digital audio input signals over which copyright protection has been asserted is first-generation or higher.

Bit 15 = "1"—All other cases.

5. *Exception Case*.—The L Bit has no meaning for A/D converters for analog signals that do not include status information concerning the C Bit and the L Bit (i.e., A/D converters in Category Code 01100XXX) and compact disc players in Category Code 10000000.

Part II. Serial Copy Management System for DAR Devices and Nonprofessional Model DAT Recorders

The intention of SCMS is generally to prevent DAR devices from making second-generation or higher "serial" digital recordings of

"original" digital audio material over which copyright protection has been asserted through SCMS. SCMS does not prevent the making of a first-generation recording of such "original" digital audio material. As future technologies permit, SCMS may limit the digital recording by a DAR device of analog audio material over which copyright protection has been asserted to the making of only first-generation digital copies. However, because present technology does not identify whether analog audio material is protected by copyright, SCMS will not prevent the making of first and second-generation digital copies of such material. SCMS will not restrict digital recording of material carrying an indication through SCMS that copyright has not been asserted. SCMS does not apply to professional model products as defined under the Act.

A. General Principles for SCMS Implementation in DAR Devices

To implement the functional characteristics of SCMS in DAR devices, whether presently known or developed in the future, the following conditions must be observed:

1. A digital audio recording medium shall be capable of storing an indication of:

(a) Whether or not copyright protection is being asserted over the audio material being sent via the interface and stored on the DAR medium; and,

(b) Whether or not the generation status of the audio material being sent via the interface and stored on the DAR medium is original.

2. If the digital audio interface format being sent to and read by a DAR device has discrete modes for professional as well as non-professional purposes, the DAR device shall distinguish accurately the professional or nonprofessional status of the interface signal.

3. If the interface format has a discrete mode for sending data other than audio material, the DAR device shall distinguish accurately whether or not the interface signal contains audio material.

4. A DAR device capable of receiving and recording digital audio signals shall observe the following rules:

(a) Audio material over which copyright is asserted via SCMS and whose generation status is original is permitted to be recorded. An indication that copyright is asserted over the audio material contained in the signal and the generation status of the recording is first generation shall be recorded on the media.

(b) Audio material over which copyright is not asserted via SCMS may be recorded, without regard to generation status. An indication that copyright is not asserted shall be recorded on the media.

(c) Audio material over which copyright is asserted via SCMS and whose generation status is not original shall not be recorded.

5. DAR media shall store the copyright and generation status information as described herein during recording in a manner that the information can be accurately read.

6. Devices that are capable of reading original recordings and/or DAR media, and that are capable of sending digital audio signals that can be recorded by a DAR device, shall accurately read the

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copyright and generation status information from the media and accurately send the information.

7. DAR devices shall not be capable of recording digital audio signals transmitted in a professional digital audio interface format.

8. DAR devices having a nonprofessional digital audio interface shall receive and accurately send the copyright and generation status information.

9. Professional devices that are capable of sending audio information in a nonprofessional digital audio interface format shall send SCMS information as implemented for that format. However, nothing shall prevent professional devices and/or recording professionals engaged in a lawful business from setting SCMS information according to the needs of recording professionals.

10. Digital audio signals that are capable of being recorded by a DAR device but that have no information concerning copyright and/or generation status shall be recorded by the DAR device so that the digital copy is copyright asserted and original generation status.

11. If the signal is capable of being recorded by a DAR device and the interface format requires an indication of the type of device sending the signal via the interface, then the device shall send the most accurate and specific designation applicable to that device; for example, "Category Codes" as set forth in Part I with reference to the IEC 958 nonprofessional interface.

12. Except as may be provided pursuant to Section 1022(b)(4) of Subchapter C of the Act, a DAR device that is capable of converting analog input signals to be recorded in digital format shall indicate that the digital copy is copyright asserted and original generation status.

13. (a) If the digital audio portion of an interface signal format is recordable by a "pre-existing" type of DAR device, i.e., one that was distributed prior to the distribution of the interface signal format, then the signal format shall implement the rules of SCMS so that the pre-existing DAR device will act upon the rules of SCMS applicable to that DAR device.

(b) If a type of DAR device is capable of recording the digital audio portion of signals sent by a pre-existing digital audio interface device, then the DAR device shall implement the rules of SCMS so that the DAR device will act upon the rules of SCMS applicable to the format of that pre-existing digital audio interface device.

(c) If a digital audio interface device is capable of translating a signal from one interface format to another, then the device also shall accurately translate and send the SCMS information.

B. Summary of mandatory SCMS specifications for DAT recorders

SCMS, to be implemented for DAT machines, requires that a DAT machine must play-back and/or record specific inaudible data in a particular location on a DAT tape. According to IEC documents "IEC 60A(CO)130 Part 1: Digital Audio Tape Cassette System (DAT) Dimensions and Characteristics" and "IEC 60A(CO)136 Part 6: Serial copy management system for consumer audio use DAT recorders", that particular location on the digital

audio tape consists of two bits known as "subcode ID6 in the main ID in the main data area" ("ID6").

1. SCMS operation when playing a DAT tape

With respect to the play-back function, a DAT machine that is connected to a DAT recorder can provide digital audio output signals via a nonprofessional interface. In that circumstance, the DAT play-back machine functions as a digital audio interface device that must provide channel status data conforming to the general principles and specifications set forth in Part I. SCMS as implemented for the IEC 958 nonprofessional interface format requires that when a DAT tape is played back, the DAT play-back machine reads the information from ID6 on the tape and then sends the corresponding channel status data (concerning Bit 2 "the C Bit" and Bit 15 "the L Bit"), along with the Category Code for a DAT machine, in its digital audio output signal. The channel status data to be sent in response to the various settings of ID6 are as follows:

1. Where ID6 is set as "00", copyright protection has not been asserted over the material under SCMS. In response to ID6, the digital audio signal output of the DAT will provide the C Bit set as "1" and the L Bit set as "0".

2. Where ID6 is set as "10", copyright protection has been asserted over the material under SCMS and the recording is not "original". In response to ID6, the digital audio output signal of the DAT will provide the C Bit set as "0" and the L Bit set as "0".

3. Where ID6 is set as "11", copyright protection has been asserted over the material under SCMS and the recording is "original". In response to ID6, the digital audio output signal of the DAT will provide the C Bit set as "0" and the L Bit set as "1".

2. SCMS operation when recording on DAT tape

With respect to the recording function, SCMS governs the circumstances and manner in which a DAT recorder may record a digital audio input signal. A DAT recorder implementing SCMS information being sent in the IEC 958 nonprofessional interface format must be capable of acknowledging the presence or absence of specific channel status information being sent to the DAT recorder via its digital audio input. The DAT recorder then responds to that channel status information by either preventing or permitting the recording of that digital audio input signal. If recording is permitted, the DAT machine records specific codes in ID6 on the tape, so that when the tape is played back, the DAT machine will issue the correct channel status data in its digital audio output signal. The settings of ID6 to be recorded in response to particular IEC 958 channel status bit information are as follows:

1. Where the C Bit of the digital audio input signal is set as "0" (copyright protection asserted), the DAT recorder shall not record the input, except in three circumstances: (a) where the input is original material and the digital audio input signal comes from one of the products on the "Category Code White List" (section D below); (b) where the digital audio input signal contains an undefined Category Code (in which case only one generation of recording is permitted); or, (c) where the digital audio input signal comes from a product with a defined Category Code but the product cur-

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rently is not capable of transmitting information regarding copyright protection (in which case, two generations of copying are possible). In circumstances (a) and (b) above, the DAT recorder will record "10" in ID6 to prevent further copying. In circumstance (c) above, the DAT recorder will record "11" in ID6 for the first-generation copy.

2. Where the C Bit of the digital audio input signal is set as "1" (no copyright protection asserted or not copyrighted), the DAT recorder will record "00" in ID6, and unlimited generations of copying will be permitted.

3. Where the C Bit of the digital audio input signal fluctuates between "0" and "1" at a rate of between 4-10 Hz, the signal is coming from a compact disc player compatible with IEC 908 (Category Code 10000000) which plays back a compact disc that is not an "original" and that contains material over which copyright protection has been asserted. The DAT recorder shall not record in this circumstance.

4. The condition "01" in ID6 has been assigned no meaning within SCMS. Therefore, to prevent circumvention of SCMS, the DAT recorder shall not record "01" in ID6 on the tape.

C. Mandatory specifications for implementing SCMS in DAT recorders in the IEC 958 format

1. Mandatory standards for digital audio output signals

a. *Category Code Bit 15 (the "L" Bit).*—All non-professional model DAT recorders having an IEC 958 interface shall provide the Category Code "1100000L" in the channel status bits of the IEC 958 digital audio output signal. The status of the L Bit of the Category Code shall be provided in the digital audio output signal of the DAT recorder as follows, in accordance with the status of ID6:

When ID6 is "00", the digital audio output signal shall indicate in the L Bit of the Category Code that the output source is either a first-generation or higher DAT tape recorded from an "original" source, or an "original" commercially released prerecorded DAT tape of material over which copyright protection is not being asserted under SCMS. In either of these cases, the L Bit shall be set as "0", and the complete Category Code would be "11000000".

When ID6 is "10", the digital audio output signal shall indicate in the L Bit of the Category Code that the output source is a first-generation or higher DAT tape recorded from an "original" source (i.e., L Bit="0"). The complete Category Code in this case would be "11000000".

When ID6 is "11", the digital audio output signal shall indicate in the L Bit of the Category Code that the output source is an "original" source, such as a commercially released prerecorded DAT tape (i.e., L Bit="1"). The complete Category Code in this case would be "11000001".

b. *Bit 2 (the "C" Bit).*—All non-professional model DAT recorders having an IEC 958 nonprofessional interface shall provide an output code in the C Bit in the channel status bits of the IEC 958 digital audio output signal. The C Bit shall be applied in the digital audio output signal as follows, in accordance with the status of ID6:

When ID6 is "00", the C Bit shall be set as "1".

When ID6 is "10" or "11", the C Bit shall be set as "0".

2. Mandatory specifications for recording functions

SCMS with respect to recording functions performed by a non-professional model DAT recorder receiving digital audio input signals in the IEC 958 nonprofessional interface format shall be implemented as follows:

1. Digital audio input signals in which the C Bit is set as "0" shall not be recorded, except for the cases specified below in paragraphs 2, 4 and 5.

2. A DAT recorder may record a digital audio input signal in which the C Bit is set as "0", where the Category Code of the signal is listed in the "Category Code White List." The DAT recorder shall record "10" in ID6 on the tape in this case.

3. For digital audio input signals in which the C Bit is set as "1", the DAT recorder shall record "00" in ID6 on the tape except for those cases specified below in paragraphs 4 and 5.

4. For digital audio input signals that contain Category Code information that is not defined in this document, the DAT recorder shall record "10" in ID6, regardless of the status of the C Bit or the L Bit.

5. For digital audio input signals originating from a source identified as an A/D converter with the Category Code "01100XXL", or from other sources such as from A/D converters with the Category Code for "General" ("00000000"), the DAT recorder shall record "11" in ID6, regardless of the status of the C Bit or the L Bit. This requirement shall be applied to digital input signals that do not contain source information of the original signal before digitization, e.g., an A/D converter that does not deliver source information.

6. For digital input signals originating from an A/D converter with the Category Code "01101XXL", which can deliver original source information concerning the C Bit and L Bit even if the source is in analog format, the requirement stated above in paragraph 5 shall not be applied. The "Category Code White List" includes this Category Code.

7. A DAT tape of "original" generation status over which copyright protection has been asserted shall contain "11" in ID6. A DAT tape of "original" generation status over which no copyright protection has been asserted shall contain "00" in ID6.

8. A DAT recorder shall not record digital audio input signals where the C Bit alternates between "0" and "1" at a frequency of between 4 and 10 Hz and the Category Code is for a Compact disc digital audio signal ("10000000"), as in the case of digital audio input signals from recordable or erasable compact discs that are not "original" and that contain material over which copyright protection has been asserted.

9. A non-professional model DAT recorder shall not record digital audio input signals sent from a professional interface, i.e., where channel status Bit 0 is set as "1".

10. The condition "01" in ID6 is not to be used.

11. Category codes and the C Bit included in the channel status information of digital audio input signals being sent to or by a

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DAT recorder shall not be deleted or modified and shall be monitored continuously and acted upon accordingly.

D. "Category code white list"

100XXXX0—Laser optical product.

010XXXX1—Digital-to-digital converter and signal processing devices.

110XXXX1—Magnetic tape and disk based product.

001XXXX0 and 0111XXX0—Receivers of digitally encoded audio transmissions with or without video signals.

101XXXX1—Musical instruments.

01101XX1—Future A/D converter (with status information concerning the C Bit and L Bit).

0001XXX1—Solid state memory based media products.

00000011—Experimental products not for commercial sale.

Part III. Application of SCMS in DAT Recorders Implementing the IEC 958 Interface

The following charts apply and correlate those codes that are mandated under the Act to implement SCMS in non-professional model DAT recorders having an IEC 958 nonprofessional interface, in those situations contemplated by these standards. The columns in each of these charts identify the following information:

The "Signal Source" column describes the type of product sending the digital audio signal to a DAT recorder.

The three columns under the heading "Digital Audio Input Signal," i.e., the signal sent to the DAT recorder, identify the correct channel status information in the C Bit, Category Code Bits 8-14 and the L Bit, respectively, which correspond to each product. (In each case, Bit 0 will be "0" to indicate that the signal is being sent in the IEC 958 nonprofessional interface format, and Bit 1 will be "0" to indicate that the signal consists of audio data.)

The next three columns under the heading "DAT Recorder Response" identify the response of the DAT recorder to the corresponding digital audio input signal. The column "ID6" specifies the code that the DAT recorder will record on the tape in ID6 in response to the digital audio input signal. The last two columns set forth the correct channel status information in the C Bit and L Bit that are sent in the digital audio output signal of a DAT recorder in response to the setting of ID6.

Each of the appropriate codes is set forth in the cases described below:

Case 1.—Where copyright protection has been asserted over the digital audio input, and the source of the input is "original" material (Only first-generation recording permitted):

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Laser optical	0	100XXXX	0	10	0	0
D/D converter	0	010XXXX	1	10	0	0
Magnetic prod.	0	110XXXX	1	10	0	0
Musical instrum.	0	101XXXX	1	10	0	0

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Future A/D conv.....	0	01101XX	1	10	0	0
Digital receiver.....	0	001XXXX	0	10	0	0
Digital receiver.....	0	0111XXX	0	10	0	0
Experimental.....	0	0000001	1	10	0	0
Solid state dev.....	0	0001XXX	1	10	0	0

Case 2.—Where copyright protection has been asserted over the digital audio input, and the source of the input is "original" material (First-generation and above recording permitted):

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Laser opticaldigital audiodigital audio.....	1	100XXXX	1	00	1	0
D/D converter.....	1	010XXXX	1	00	1	0
Magnetic prod.....	1	110XXXX	1	00	1	0
Musical instrum.....	1	101XXXX	1	00	1	0
Future A/D conv.....	1	01101XX	1	00	1	0
Digital receiver.....	1	001XXXX	1	00	1	0
Digital receiver.....	1	0111XXX	1	00	1	0
Experimental.....	1	0000001	1	00	1	0
Solid state dev.....	1	0001XXX	1	00	1	0

Case 3.—Where copyright protection has been asserted over the digital audio input, and the source of the input to the DAT recorder is not "original" material (No recording permitted):

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L Bit (Bit 15)
Laser Optical.....	0	100XXXX	1			
D/D converter.....	0	010XXXX	0			
Magnetic prod.....	0	110XXXX	0			
Musical Instrum.....	0	101XXXX	0			
Future A/D conv.....	0	01101XX	0			
Experimental.....	0	0000001	0			
Solid state dev.....	0	0001XXX	0			

Case 4.—Where copyright protection has not been asserted over the digital audio input, and the source of the input to the DAT recorder is not "original" material (Second-generation and above recording permitted):

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L Bit (Bit 15)
Laser Optical.....	1	100XXXX	1	00	1	0
D/D converter.....	1	010XXXX	0	00	1	0
Magnetic prod.....	1	110XXXX	0	00	1	0
Musical Instrum.....	1	101XXXX	0	00	1	0
Future A/D conv.....	1	01101XX	0	00	1	0

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L Bit (Bit 15)
Experimental.....	1	0000001	0	00	1	0
Solid state dev.....	1	0001XXX	0	00	1	0

Case 5.—Where the digital audio input signal includes Category Code information, but cannot provide information concerning copy-right protection of the source (First- and second-generation record permitted):

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L Bit (Bit 15)
General.....	X	0000000	0	11	0	1
Present A/D Con.....	X	01100XX	X	11	0	1

Case 6.—Where the digital input signal does not include a defined Category Code (First-generation recording permitted):

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L Bit (Bit 15)
Undefined.....	X		X	10	0	0

Case 7.—Where copyright protection has been asserted over the digital audio input from a compact disc that is not an "original" by fluctuating the C Bit at a rate between 4-10 Hz (No recording permitted):

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L Bit (Bit 15)
CD Player.....	0/1	1000000	X			

Case 8.—Where the digital signal transmitted to a Digital Receiver does not include information concerning copyright protection (Only first-generation recording permitted):

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Digital Receiver.....	0	001XXXX	0	10	0	0
Digital Receiver.....	0	0011XXX	0	10	0	0

Case 9.—Where the digital signal transmitted to a receiver for Electronic Audio Software Delivery provides generation status information as if the status were first-generation or higher (No recording permitted):

Signal source	Digital audio input signal			DAT recorder response		
	C Bit (Bit 2)	Category code (Bits 8-14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Digital Receiver	0	001XXXX	1			
Digital Receiver	0	0111XXX	1			

AGENCY VIEWS

U.S. DEPARTMENT OF COMMERCE,
NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY,
Gaithersburg, MD, March 31, 1992.

Hon. CARDISS COLLINS,
*Chairwoman, Subcommittee on Commerce, Consumer Protection,
and Competitiveness, Committee on Energy and Commerce,
House of Representatives, Washington, DC.*

DEAR MADAM CHAIRWOMAN: Your recent letter requesting our appearance at the March 31, 1992, hearing on "Digital Audio Recording Technology: Commerce and Consumer Protection Issues" also requested the answer to seven questions. We have coordinated our response with the Patent and Trademark Office, agreeing that three of the questions, numbers 1, 4, and 7, are technical and so appropriate for the National Institute of Standards and Technology. The answers to those questions are enclosed. The remainder of the questions will be answered by the Patent and Trademark Office.

Sincerely,

JOHN W. LYONS.

Enclosure.

STATEMENT OF JOHN W. LYONS, DIRECTOR, NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY

Madame Chairwoman and Members of the Subcommittee, I thank you for the opportunity to provide comments on digital audio recording technology on behalf of the National Institute of Standards and Technology. The National Institute of Standards and Technology is part of the Technology Administration of the Department of Commerce. The Institute is the Government's lead laboratory for measurements and is charged with assisting industry in the rapid commercialization of advanced technology.

The National Institute of Standards and Technology first became involved in digital audio recording in 1987 at the request of responsible Congressional committees and with the financial support of both the Home Recording Rights Coalition and the Recording Industry Association of America, Inc. Then, technology was being developed to permit producers to encode recordings so that they could not be copied without paying appropriate royalties. By 1987, CBS Records had developed a specific copy protection scheme which it was offering to the industry. The Congressional committees asked NIST (at that time named the Na-

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PROOF OF SERVICE

I, Anita M. Marlin, declare:

I am employed in the City of Palo Alto, County of Santa Clara, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to the within action. I am employed by Wilson, Sonsini, Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304-1050. I am readily familiar with Wilson, Sonsini, Goodrich & Rosati's practice for collection and processing of documents for delivery by way of the service indicated below:

- ☒ By consigning such copy in a sealed envelope, postage thereon fully prepaid, with the United States Postal Service for collection and mailing.
- ☐ By consigning such copy in a sealed envelope to an overnight courier for next business day delivery.
- ☐ By consigning such copy in a sealed envelope to a messenger for guaranteed hand delivery.
- ☐ By consigning such copy to a facsimile operator for transmittal.

On December 22, 1998, in accordance with ordinary business practices at Wilson, Sonsini, Goodrich & Rosati, I caused the foregoing

**1. BRIEF FOR APPELLEE SUBMITTED BY DEFENDANT-APPELLEE
DIAMOND MULTIMEDIA SYSTEMS, INC.**

to be filed and served in the manner identified above on the person(s) listed below:

Clerk of the Court
U.S. Court of Appeals
Post Office Box 193939
San Francisco, CA 94119-3939

Laurence J. Hutt
Brian K. Condon
ARNOLD & PORTER
777 South Figueroa St., 44th Floor
Los Angeles, CA 90017

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at Palo Alto, California on December 22, 1998.


Anita M. Marlin